TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911

No. 115

AMERICAN LITHOGRAPHIC COMPANY, PLAINTIFF IN ERROR,

vs.

EMIL WERCKMEISTER.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED DECEMBER 21, 1911.

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(21,447.)

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a United States Circuit Court of Appeals for the Second Circuit.

THE AMERICAN LITHOGRAPHIC COMPANY, Plaintiff in Error (Defendant below),

vs.

EMIL WERCKMEISTER, Defendant in Error (Plaintiff below).

Transcript of Record.

Error to the Circuit Court of the United States for the Southern District of New York.

Printed under the direction of the clerk.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Circuit Court of the United States for the Southern District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Circuit Court, before you, or some of you, between Emil Werckmeister, plaintiff, and American Lithographic Company, defendant, a manifest error hath happened, to the great damage of the said American Lithographic Company, as is said and appears by its complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the United States Circuit Court of Appeals for the Second Circuit, at the City of New York, together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the 15th day of June, 1907, that the record and proceedings aforesaid being inspected, the said Judges of the United States Circuit Court of
2 Appeals for the Second Circuit may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 17th day of May, in the year of our Lord one thousand nine hundred and seven, and of the Independence of the United States the one hundred and thirty-first.

[L. S.] JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

E. H. LACOMBE,
U. S. Circuit Judge.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from one to three hundred and nine, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of American Lithographic Company, plaintiff in error, against Emil Werckmeister, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 19th day
3 of February, in the year of our Lord one thousand nine hundred and eight, and of the Indepenndence of the United States the one hundred and thirty-second.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

(Endorsed:) The U. S. Circuit Court of Appeals for the Second Circuit.—American Lithographic Company, Plaintiff in Error, vs. Emil Werckmeister, Defendant in Error.—Original Writ of Error.—Wetmore & Jenner, Attorneys for Plaintiff in Error.—Service of a copy of the within Writ of Error is hereby admitted this 20th day of May, 1907. Briesen & Knauth, Attorneys for Defendant in Error.—U. S. Circuit Court, Southern District, N. Y.—Filed May 22, 1907.—John A. Shields, Clerk.

4 United States Circuit Court, Southern District of New York.

EMIL WERCKMEISTER, Suing for Himself and the United States,
against
AMERICAN LITHOGRAPHIC COMPANY.

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the Borough of Manhattan, in the City of New York, this 17th day of July, in the year one thousand nine hundred and three.

JOHN A. SHIELDS, *Clerk.*

BRIESEN & KNAUTH,
Plaintiff's Attorneys.

Office and Post Office address, 49 Wall Street, Borough of Manhattan, New York City.

5 Circuit Court of the United States for the Southern District of New York.

EMIL WERCKMEISTER, Suing for Himself and the United States, Plaintiff,
against
AMERICAN LITHOGRAPHIC COMPANY, Defendant.

The amended complaint of the above named plaintiff against the above named defendant respectfully shows to this Court, upon information and belief:

First. That said plaintiff, during the times hereinafter stated, was and is a citizen of the German Empire, doing business at the City of Berlin, in Germany, under the trade name of "Photographische Gesellschaft," and at the City of New York, in the United States, under the name of "Berlin Photographic Company."

Second. That said defendant is a corporation, duly incorporated under the laws of the State of New York, and having a place of business in the Borough of Manhattan, in the County and State of New York, in the Southern District of New York.

Third. That shortly previous to the second day of April, 1894, one W. Dendy Sadler, a British subject, invented, designed and painted a certain painting called "Chorus," said painting showing a group of gentlemen sitting and standing around a punch
6 bowl, and holding pipes and filled glasses in their hands, and singing in chorus; and said painting, by reason of its artistic grouping, its excellent drawing of the figures and faces, and its skillful execution, is a piece of art of very great merit and value.

Fourth. That said W. Dendy Sadler, on or about the second day of April, 1894, by an instrument in writing executed and delivered on the said day, and previous to any publication of said painting in any manner or form, assigned, transferred and sold to said plaintiff for a valuable consideration all his rights, title and interest in any copyright obtainable thereon in the United States of America and in all other countries, and the sole liberty and right of printing and reprinting, publishing, completing, copying, executing, finishing and vending said painting.

Fifth. That having acquired the right to obtain such copyright for said painting, and being a subject of the Emperor of Germany, and desiring to secure the copyright thereof under the laws of the United States of America respecting copyrights, and the sole right of printing and reprinting, publishing, completing, copying, executing, finishing and vending the same, said plaintiff, before the publication thereof in this or any foreign country, to wit, on the sixteenth day of April, 1894, delivered to the Librarian of Congress, at his office at Washington, District of Columbia, a description of said painting, to wit, "Chorus," W. Dendy Sadler, "A Company of Gentlemen with Filled Glasses, Singing in Chorus," and also a photograph thereof, and at the same time said plaintiff paid to the said Librarian of Congress the sum of one dollars ($1) for recording

said description, and thereupon said Librarian of Congress duly received the same and recorded said description of said painting on the sixteenth day of April, 1894.

7 Sixth. That the first condition of Section 4970 of the Statutes of the United States, whereby the plaintiff is entitled to the benefit of copyright on substantially the same basis as citizens of the United States, existed before the sixteenth day of April, 1894, as determined by proclamation of the President of the United States, dated April 15, 1892.

Seventh. That thereafter, on or about the first day of June, 1894, and not before said plaintiff began the publication of said painting in this country and in foreign countries by the sale of copies thereof.

Eighth. That by reason of the premises and the statutes in such cases made and provided, there was secured to said plaintiff, his executors, administrators and assigns, or intended so to be, for the term of twenty-eight (28) years from said sixteenth day of April, 1894, the sole liberty of printing and reprinting, publishing, completing, copying, executing, finishing and vending the said painting, "Chorus," and that said plaintiff thereupon became, has at all times hereafter mentioned been, and now is, the proprietor of said copyright.

Ninth. That said plaintiff has duly given notice of his copyright, as is required by law, by inscribing upon a visible portion of every copy of said painting published by him, or of the substance on which the same were mounted, the word "Copyright," together with the year the copyright was entered, and the name of the party by whom it was taken out, thus: "Copyright, 1894, by Photographische Gesellschaft."

Tenth. That after the recording of the description of said painting "Chorus," and within two years previous to the commencement of this action, contrary to the provisions of title LX., Chapter III., of the Laws of the United States, said defendant without the con-

8 sent of the plaintiff, the proprietor of said copyright, first obtained in writing, signed in presence of two or more witnesses, did work, copy, print, publish and sell thirty thousand and one hundred copies of said copyright painting within the jurisdiction of this Court, in violation of said plaintiff's copyright and with full knowledge of plaintiff's claims thereunder, and that said copies were contained on more than one thousand separate sheets.

Eleventh. That by virtue of the Statutes of the United States and of the Title LX., Chapter III. thereof, said defendant has forfeited and did become and is indebted to said plaintiff and to the United States of America in a penalty of ten dollars ($10) for each and every sheet containing a copy of said painting "Chorus," made in violation of said plaintiff's copyright, and sold, as aforesaid, one-half thereof to go to said plaintiff and one-half to the United States.

Twelfth. And that by reason of the premises and by force of the statute in such cases made and provided an action has accrued to said plaintiff to demand and have of and from the said defendant the said penalty so forfeited and owing as last above specified.

Wherefore, said plaintiff demands judgment for himself and the

United States of America against the said defendant for the sum of ten thousand dollars ($10,000), half thereof to be paid to him and half to the United States, together with the costs of this action.

BRIESEN & KNAUTH,
Plaintiff's Attorneys, 49 Wall Street, New York.

9 SOUTHERN DISTRICT OF NEW YORK,
State of New York, County of New York, ss:

Antonio Knauth, being duly sworn, deposes and says:

That he is one of the attorneys for the plaintiff in the foregoing amended complaint; that he has read said amended complaint and knows the contents thereof, and that the same is true except only the allegations therein stated to be on information and belief, and that as to those allegations he believes it to be true. Deponent further says that the reason why this verification is not made by said plaintiff is that said plaintiff is not in this country, but is a resident of Berlin in the Empire of Germany, and not at present in this country and capable of making this affidavit; and that the sources of deponent's information and the grounds of his belief concerning the matters stated to be alleged on information and belief in said amended complaint are the possession of the certificate of the copyright referred to in said complaint issued by the Librarian of Congress, correspondence and personal interviews with the plaintiff, correspondence with the defendant and its attorneys, and the personal examination of the defendant's infringing picture.

ANTONIO KNAUTH.

Sworn to before me this 21st day of December, 1903.
[SEAL.]
OTTO V. SCHRENK,
Notary Public, N. Y. County.

(Endorsed:) United States Circuit Court, Southern District of New York.—Emil Werckmeister, suing for himself and the United States, Plaintiff, vs. American Lithographic Co., Defendant.—Amended Complaint.—Briesen & Knauth, Attorneys for Plaintiff, 49 Wall St., Borough of Manhattan, New York.—Service of a copy of the within Amended Complaint is hereby admitted this 25th day of December, 1903. Wetmore & Jenner, att'ys for Def't.

10 Circuit Court of the United States for the Southern District of New York.

EMIL WERCKMEISTER, Suing for Himself and the United States, Plaintiff,
vs.
AMERICAN LITHOGRAPHIC COMPANY, Defendant.

The above named defendant answers the complaint of the plaintiff and the answer says:

I. This defendant has no knowledge or information sufficient to

form a belief as to any of the matters set forth in the complaint of the plaintiff, excepting that—

This defendant admits that it is a corporation duly incorporated under the laws of the State of New York and that it has a place of business in the Borough of Manhattan, in the County and State of New York and Southern District of New York, and excepting that—

This defendant denies the allegations contained in the tenth, eleventh and twelfth paragraphs of the complaint.

For a further and separate defense referring to the denials, admissions and allegations hereinbefore contained material to this separate defense, with the same force and effect as if the same were here at length repeated, this defendant alleges:

II. Upon information and belief that if any such copyright was obtained by the plaintiff as is set forth in the complaint herein, which, however, the defendant does not admit, but denies as
11 aforesaid, the same was and is void for the reason that the plaintiff, at the time of taking out the said copyright, was not and never had or has been either the author, inventor, designer or proprietor of the said painting "Chorus" alleged in the complaint herein to have been copyrighted, nor the assignee of the author, inventor, designer or proprietor thereof, and had no right or authority under the statute relating to copyrights to take out or obtain any copyright thereon.

For a further and separate defense to the cause of action set forth in the complaint, this defendant, referring to the denials, admissions and allegations hereinbefore contained material to this separate defense, with the same force and effect as if the same were here at length repeated, alleges upon information and belief as follows:

III. That if any such copyright was obtained by the plaintiff, as is set forth in the complaint herein, which, this defendant does not admit but denies, as aforesaid, the same was and is void and was abandoned to the public, and the plaintiff had and has no right to maintain any action thereon for the reason that the said painting "Chorus," alleged in the complaint to have been copyrighted, was publicly exhibited by the author and proprietor thereof at the exhibition of the Royal Academy of Arts, held in the City of London, England, from the first Monday of May, in the year 1894, to the first Monday of August in the same year, both days inclusive, and continuously during said period, and was during the whole of said period exhibited to the public and published, and that there was not at any time during the whole of said period exhibited to the public and published, and that there was not at any time during the said exhibition, nor before, nor at any time since, any notice of the said copyright inscribed upon some visible portion of the said painting or on the substance on which the same was mounted, as required by the statute in such case made and provided, and that such exhibition and publication was with the knowledge, consent and
12 permission of the plaintiff and the said Sadler, the author and proprietor of said painting.

Wherefore, the defendant demands judgment that the complaint

be dismissed, with costs, that the plaintiff be required to return the copies of said picture so seized by the Marshal of this Court, or the value thereof, and that the defendant have judgment against the plaintiff by reason of the damages caused by the taking and detention thereof.

WETMORE & JENNER,
Defendant's Attorneys, No. 34 Pine Street,
Borough of Manhattan, New York City.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Robert M. Donaldson, being duly sworn, deposes and says:

That the foregoing answer is true of my own knowledge, except the matters therein stated to be alleged upon information and belief and as to those matters I believe it to be true. That the reason why this verification is not made by the defendant is that the defendant is a corporation, that I am the vice-president thereof, that my information has been derived from employees of the defendant having knowledge or information on the matters set forth in the answer, and the statements made to me by such persons are the grounds of my belief.

ROBERT M. DONALDSON.

Sworn to and subscribed before me this 8th day of September, 1903.

[SEAL.]

GRACE A. TAYLOR,
Notary Public, N. Y. Co.

(Endorsed:) United States Circuit Court, Southern District of New York.—Emil Werckmeister, Plaintiff, vs. American Lithographic Co., Defendant.—Answer.—Wetmore & Jenner, Att'ys for Def't, 34 Pine St., New York.—Received Sept. 9 '03.

13 At a Stated Term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms in the Borough of Manhattan, in the City of New York, on Friday, the 2nd day of November, in the year of our Lord one thousand nine hundred and six.

Present: The Honorable George W. Ray, Judge.

EMIL WERCKMEISTER, Suing for Himself and the United States,
v.
AMERICAN LITHOGRAPHIC COMPANY.

Now comes the plaintiff, by Antonio Knauth, Esq., his attorney, and moves the trial of this cause. Likewise comes the defendant, by William A. Jenner, Esq., its attorney. Thereupon a jury is impaneled and the cause proceeds to trial.

Thereafter on Friday, the 9th day of November, 1906, after hearing the evidence for the plaintiff, the arguments of counsel and the charge of the Court, the jury retire in charge of an officer duly qualified to attend them, and upon their return say they find verdict for the plaintiff for $10,000.

Mr. Bethune on behalf of the defendant moves that the jury be polled.

Granted.

Mr. Bethune on behalf of the defendant moves to set the verdict aside and for a new trial.

Denied.

Mr. Bethune, on behalf of defendant moves for a stay of sixty days within which to make and serve a case with leave to
14 turn same into a bill of exceptions.

Granted.

Plaintiff to have a like time to file amendments, and execution of judgment stayed provided the appeal is speedily prosecuted.

Plaintiff to be at liberty to move at any time to vacate stay of execution. An extract from the minutes.

JOHN A. SHIELDS, *Clerk.*

United States Circuit Court, Southern District of New York.

EMIL WERCKMEISTER, Suing for Himself and the United States,
Plaintiff,
against
THE AMERICAN LITHOGRAPHIC COMPANY, Defendant.

The issues in this action having been brought on for trial before the Honorable George W. Ray, United States District Judge, and a jury, at a Stated Term of this Court, held in the Court Room thereof, in the Post-Office Building, in the City of New York, Borough of Manhattan, on the second, fifth, seventh, eighth and ninth days of November, 1906, and the issues having been tried and a verdict rendered in favor of the plaintiff for ten thousand dollars ($10,000).

Now, therefore, on motion of Briesen & Knauth, attorneys for the plaintiff,

It is adjudged that the plaintiff, Emil Werckmeister, recover from the defendant, the American Lithographic Company, the sum
15 of ten thousand dollars, together with 90 44/100 dollars, costs and disbursements, amounting in the whole to 10,090 44/100 dollars, and that the plaintiff have execution therefor.

Dated New York, November 12, 1906.

(Endorsed:) United States Circuit Court, Southern District of New York.—Emil Werckmeister, suing for himself and the United States, *vs.* The American Lithographic Company, Def't.—Judgment.—Briesen & Knauth, Attorneys for Plaintiff, 49 Wall Street, Borough of Manhattan, New York.—U. S. Circuit Court, Southern

District of New York.—Filed Nov. 22, 1906.—John A. Shields, Clerk.

United States Circuit Court, Southern District of New York.

EMIL WERCKMEISTER, Plaintiff,
vs.
AMERICAN LITHOGRAPHIC COMPANY, Defendant.

Please take notice that the within is a copy of the bill of exceptions proposed on behalf of the defendant herein.
Dated January 8, 1907.
Yours, &c.,

WETMORE & JENNER,
Attorneys for Defendant.

Office and Post Office address, 34 Pine Street, Borough of Manhattan, New York City.

To Messrs. Briesen & Knauth.

16 United States Circuit Court, Southern District of New York.

EMIL WERCKMEISTER
vs.
THE AMERICAN LITHOGRAPHIC COMPANY.

Bill of Exceptions.

At a term of the Circuit Court of the United States in and for the Southern District of New York, held at the Court Room, in the Post Office Building, in the City of New York, before the Hon. George W. Ray, District Judge, on the 2d to 9th days of November, 1906, the issue joined by the parties herein upon the pleadings came on to be tried before the Court and a jury, for that purpose duly empaneled and then came there as well said Emil Werckmeister, plaintiff, by Antonio Knauth, his counsel, and the said American Lithographic Company by William A. Jenner and Faneuil D. S. Bethune, its counsel, and the jurors for that purpose duly empaneled to try the said issues, being called, also came then, and were then and there in due manner chosen and sworn to try the said issues, and then and thereupon counsel for the respective parties consented in open court to proceed with eleven jurors and the trial proceeded as follows:

Plaintiff offers the following deposition:

"EMIL WERCKMEISTER, resident of No. 1 An der Stechbahn, Berlin, Germany, by occupation an art publisher, aged fifty-eight years and upwards, being duly and publicly affirmed, pursuant to the directions hereto annexed, and examined on the part of the plaintiff, doth depose and say as follows:

"Q. 1. State your name, age, residence and occupation.

"A. My name is Emil Werckmeister. I am fifty-eight
17 years of age. My address is No. 1 An der Stechbahn, Berlin, Germany. I am a fine arts publisher. I am a citizen of Germany, born in Germany of German parents, and have lived here all my life. The firm name of my business is Photographische Gesellschaft, Berlin (Germany). This name has been used since 1862, and our business location is No. 1 An der Stechbahn.

"Q. 4. Are you the person who caused to be delivered to the Librarian of Congress at his office at Washington, District of Columbia, a description of a painting painted by one W. Dendy Sadler, in the following words: 'Chorus'—W. Dendy Sadler, 'A company of gentlemen with filled glasses singing in Chorus,' and also a photograph thereof?

"A. Yes, I am the same person. I caused to be mailed to the Librarian of Congress at Washington the description and a photograph of a painting entitled 'Chorus,' by W. Dendy Sadler. I called on W. Dendy Sadler at his studio in Finchley Road, London, in February, 1894, and saw his picture 'Chorus' very nearly finished. I asked whether I might buy the copyright of this picture. He answered in the affirmative and asked two hundred pounds sterling for the copyright. I consented to this price and thereupon the purchase was agreed upon orally between me and W. Dendy Sadler. With reference to the painting itself it was agreed orally that it should be sent to the Photographische Gesellschaft, Berlin, Germany, as soon as possible. The price agreed upon for the copyright was paid to W. Dendy Sadler, in London, through Mr. A. Levi, the manager of the London Agency, on April 11, 1894, in our check for £200 on the Union Bank, in London, which check had been sent to Mr. Levi for this purpose by my firm in Berlin on April 9, 1894. The Photographische Gesellschaft received the said painting in Berlin March 8, 1894. We made reproductions of it and returned it to W. Dendy Sadler on March 22d, 1894.

18 I produce herewith a correct copy of the original, made by the process of photogravure. In order to put it into a convenient form, so that it can be attached to my deposition, it is cut into eight pieces and mounted on calico. I hereby sign this copy for identification, and ask that is be attached to my deposition.

Marked Plaintiff's Exhibit B.

I know W. Dendy Sadler's handwriting thoroughly, for I saw very often his written answers, when, on the occasion of my visits in London, our London manager had asked W. Dendy Sadler for an appointment.

In February, 1894, W. Dendy Sadler signed an instrument in writing, dated April 2, 1894, relating to the copyright of said painting, and handed it to our London agency, which transmitted it to my Berlin firm.

I produce the instrument referred to, which is bound into a volume of the permanent records of our office, and I state that

the signature under the name is in the handwriting of said W. Dendy Sadler.

Marked Plaintiff's Exhibit C, and the following is a copy thereof:

"Photographische Gesellschaft, Berlin, Kunstverlag.

"I hereby transfer the copyright in my picture 'Chorus' to the Photographische Gesellschaft, Berlin (The Berlin Photographic Company), for the sum of £200. London, April 2d, 1894.

"(Signed) W. DENDY SADLER."

We first put copies of the said painting made by the photogravure process on the market in the fall season of 1894. The copyright notice was engraved in the copper-plate, as shown by the copy attached to this deposition in the words, "Copyright, 1894,
19 by Photographische Gesellschaft" on the left upper margin of the photogravure.

Later on, we put on the market also photographs of said painting, and this same copyright notice is printed either on the mount of the photographs or stamped into the surface of the copy. The head officials of my shipping department control such marking.

Mr. JENNER: I move to strike out from the answer the words, "and this same copyright notice is printed on the mount of the photographs or stamped into the surface of the copy" as indefinite and not asserting one thing or the other. One of them may be in conformity with the statute and the other may not.

Motion denied. Defendant excepts.

Defendant's counsel reads the cross-examination as follows:

"Cross-examination:

"A. I did business during the whole of the year 1894 in the United States of America. The address of my agency in New York was No. 14 East Twenty-third street, and it was conducted under the name of the Berlin Photographic Company.

I caused to be delivered to the Librarian of Congress the description referred to in the fourth direct-interrogatory (and of which I produce a correct copy to be attached to my deposition) in the following manner: I mailed the description, together with a photograph of the painting on March 31, 1894, to my New York agency, in order to be deposited in the mail within the United States, addressed to the Librarian of Congress at Washington, District of Columbia."

Plaintiff offers in evidence a certified copy of the application that was filed with the Librarian of Congress for this copyright.
20 Defendant objects, because it is not in accordance with the Act of Congress nor with the facts shown, because it describes the Photographische Gesellschaft as proprietors of the copyright and not as proprietors of the painting, as the Act of Congress requires.

Objection overruled. Exception by defendant.

Marked Plaintiff's Exhibit D, and the following is a copy thereof:

"Photographische Gesellschaft, Berlin.

"BERLIN, *March 31st*, 1894.

"To the Librarian of Congress, Washington, D. C.

"SIR: Please find enclosed Doll. 1.50 for record fee and certificate of copyright for a painting.
"by W. Dendy Sadler,
"entitled—'Chorus.'
of which we are the proprietors of the copyright and of which the following is a description:
"'A company of gentlemen with full glasses singing in chorus.'

"We also enclose a photograph of the painting as required by law and request that the certificate of copyright be sent to the care of the Berlin Photographic Company, 14 East Twenty-third street, New York City.

"Very respectfully,
PHOTOGRAPHISCHE GESELLSCHAFT.

Plaintiff's counsel reads from the redirect-examination as follows:

The manager of my business in the United States, during the year 1894 was L. H. Schutze of 14 East Twenty-third street, New York.

"WITNESS (continued): In using my firm name Photo-
21 graphische Gesellschaft in my correspondence, it is my habit to refer to my establishment in the plural. I use the term 'we' when speaking of my house."

Defendant reads:

Samples of the reproductions of the said painting 'Chorus' were given to all our travelers and agents for the fall season of 1894, and it would be difficult to state where the first copies were sold."

Complainant offers in evidence the deposition of Walter Dendy Sadler.

"WALTER DENDY SADLER, of Hemingford Grey, St. Ives, in the County of Huntington, England, an artist, being duly sworn and examined on behalf of the complainant and plaintiff in the above entitled causes, respectively, testified as follows:

"Q. 1. What is your name, age, residence and occupation?

"A. My name is Walter Dendy Sadler, my age is 48 years and upwards; I reside at Hemingford Grey, St. Ives, in the County of Huntington, England, and my profession is that of an artist. I am a subject of Great Britain and I have been so all my life.

"Q. 3. Are you the person who designed and painted a certain oil painting called 'Chorus,' a copy of which, reproduced on a small scale by photogravure process, is hereto attached?

"A. I am.

"Q. 4. Please state when you designed and painted said painting?

"A. During the years 1893 and 1894.

"Q. 5. State whether you ever had any transaction with Emil

Werckmeister, of Berlin, Germany, with reference to said painting, or the copyright thereof, and, if so, what was agreed upon between you and him and when and where?

"A. Yes. I agreed in January, 1894, to sell to the said Emil Werckmeister, of Berlin, Germany, the copyright of the said painting 'Chorus,' designed and painted by me, for the sum of £200, the painting to be sent to him at Berlin to be photogravured
22 and returned to me in time for me to exhibit it at the annual exhibition of the Royal Academy in 1894. The transaction took place in my studio, 44 Finchley Road, in the County of London, England. The said agreement was, in the first place, made verbally and confirmed afterwards in writing.

"Q. 7. What, if anything, was agreed, with reference to the possession of the painting?

"A. No agreement was necessary with reference to the painting, as the transaction with the said Emil Werckmeister was solely an agreement for the sale of the copyright; he only had the loan of the painting for the purpose of its being photogravured, with the understanding, as I have before testified, that he was to return it to me in time for its exhibition at the forthcoming annual exhibition at the Royal Academy in 1894, which he did.

The said Emil Werckmeister paid me £200 for the copyright of the said painting and I caused the said painting to be delivered to him in London for the purpose of its being photogravured, and he returned it to me in accordance with his agreement, in time for its exhibition by me at the annual exhibition of the Royal Academy in 1894.

"Q. 10. State whether you executed and delivered to said Emil Werckmeister on or about April 2, 1894, a written paper of assignment, in the following language: 'I hereby transfer the copyright in my picture "Chorus" to the Photographische Gesellschaft, Berlin (The Berlin Photographic Company), for the sum of £200. London, April 2, 1894. W. Dendy Sadler?'

"A. Yes, I did.

"Q. 11. State whether or not, previously to said April 2, 1894, said painting had ever been published by you, and, if so, how, when and where?

Defendant objects, as calling for an opinion on a matter of law and construction, in respect to the time published.

Objection overruled. Exception by defendant.

23 "A. No; previously to said April 2, 1894, said painting had never been published by me or any one else."

Defendant's counsel reads the cross-examination as follows:

"X Q. 1. If you answer the third or fourth direct interrogatories, or either of them, state whether said picture called 'Chorus' was a painting in oil, upon canvas or upon wood, and about what were the dimensions thereof?

"A. It was a painting in oil, on canvas, and its size was 50 inches by 38 inches.

"My transactions was with Emil Werckmeister of Berlin, Ger-

many, himself, anad the said transaction was oral. He asked me the price of the copyright. I told him £200, at which he kicked. I stuck out and he agreed to pay that sum. The picture was in an unfinished state at the time I was negotiating with him for the sale of the copyright. I agreed to have it finished by the first of March, 1894, in order that he might send it over to Berlin to be photogravured, he undertaking that he would return me the painting in time to send it in to the annual exhibition at the Royal Academy in 1894. This was afterwards reduced to writing in the form of a letter written to me by Mr. Arthur Levy, the manager of the Berlin Photographic Company, dated from No. 133 New Bond street, London, England, and signed by the said Arthur Levy. I had not seen the said Arthur Levy before in connection with this transaction. I have not kept the said letter or a copy thereof, as my interest in the picture and copyright ceased so long ago. I, therefore, cannot produce either the original or a copy thereof for the purpose of being annexed to my deposition.

"X Q. 4. State whether the said picture 'Chorus' was exhibited at the exhibition of the Royal Academy of Arts, held in London, England, in the year 1894, and if it was exhibited, will you
24 state how long it remained on exhibition?

"A. Yes; the said picture 'Chorus' was exhibited at the exhibition of the Royal Academy of Arts, held in London, England, in the year 1894, and it remained on exhibition for about three months.

"X Q. 5. Was said picture 'Chorus,' during the time of said exhibition framed, and when so framed, was it hung in one of the galleries of the exhibition, so that visitors to the exhibition could see the same?

"A. I answer the whole of this cross-interrogatory in the affirmative.

"X Q. 6. While the said picture was exhibited at said Royal Academy exhibition, was there inscribed upon some visible portion thereof, or on the substance upon which the said picture was mounted, or on the frame thereof, the following words, viz., 'Copyright, 1894, by W. Dendy Sadler,' or any words of like import, or importing that a copyright had been taken either by you or by any one else, in the year 1894, or in any other year.

"A. I answered the whole of the matters propounded to me in this cross interrogatory in the negative.

"X Q. 7. Who was the owner of said painting 'Chorus' at the time of the exhibition thereof at said Royal Academy exhibition?

"A. I was the owner.

"X Q. 8. Were not you the owner of said painting 'Chorus' during the period of said exhibition?

"A. Yes I was.

During the said exhibition there was not at any time any notice of any copyright thereof inscribed upon some visible portion thereof, or on the substance on which the same was mounted, or on the frame thereof.

I have examined the paper writing hereto annexed, bearing date

January 23, 1902, and I say it is in my handwriting and it is signed by me."

The letter referred to is as follows:

25 " Hemingford Grey,
" Saint Ives, Hunts.

"JAN'Y 23, '02.

"DEAR SIR: My picture 'Chorus' is in the possession of Vincent Cotterell, Esq'r, 76 Grosvenor Street, W. It has only been exhibited once, to my knowledge, that was at the Royal Academy.

"Believe me, Yours truly,

"W. DENDY SADLER."

The picture 'Chorus' referred to in said paper writing, dated January 23, 1902, is the same picture as that to which I have referred in my preceding answers."

Yes, I sold the said picture or painting 'Chorus' and parted with the possession of it in October, 1899, to Mr. Vincent Cottrell, of 76 Grosvenor street, in the County of London, England."

"X Q. 14. Was it not the fact that when your said picture 'Chorus' was exhibited in the Royal Academy in the year 1894, no copyright notice was attached to or inscribed upon any visible portion of the said picture, or on the substance on which the same was mounted?"

A. I answer the whole of the matters propounded to me in this cross-interrogatory in the affirmative; that is to say, no notice was attached thereto.

"X Q. 15. Was it not the fact that said painting 'Chorus' was for sale at the time of said Royal Academy exhibition in 1894?"

"A. Yes, it was the fact that said painting 'Chorus' was for sale at the time of said Royal Academy exhibition in 1894, but with the copyright reserved.

The picture 'Chorus' is, so far as I know, at the present time hanging in the dining-room of the said Mr. Vincent Cotterell, at No. 76 Grosvenor street, in the County of London, England. The last time I saw it hanging there was in January last."

26 Redirect examination read by PLAINTIFF'S COUNSEL, as follows:

"R. D. Q. 1. Did you give or send to the Royal Academy any instructions concerning the care of or disposition over the picture 'Chorus' at the time when you caused it to be exhibited at the exhibition of 1894 mentioned by you in your cross-examination?

"A. No; I gave the price of the picture 'Chorus' for sale in writing in the Royal Academy sale book, reserving the copyright, but I gave the Royal Academy no instructions concerning the care of or disposition over the said picture. I relied entirely on the rules of the Royal Academy to protect my interests as regards non-copying and safe keeping.

"R. D. Q. 2. Had you previously known the exhibitions of the

Royal Academy, and the manner in which they were conducted, with especial reference to the copy- of pictures while they were on exhibition?

"A. Yes; I had known since 1873 the exhibitions of the Royal Academy and the manner in which they were conducted, with especial reference to the copying of pictures while they were on exhibition.

The rule of the Royal Academy, as long as I have known it, has been that copies of the exhibited pictures are not on any account to be made or taken at the annual exhibition at the Royal Academy by the public or even by the artists themselves, whose pictures are on exhibition, and not even a rough pencil sketch is allowed to be made by any one while the pictures are on exhibition.

"R. D. Q. 4. Did you rely on the rule, if any, stated by you in answer to the foregoing interrogatory, when you delivered your picture 'Chorus' to the Royal Academy for exhibition, as stated by you, or did you make any special arrangement or agreement with the Royal Academy with reference thereto? If so, please state what arrangement was between you and the Royal Academy with
27 reference to the right of the public, or visitors of the Academy, or anybody, to copy said picture at and during the exhibition mentioned?"

Defendant objects as calling for an opinion on a matter of law, as secondary and as incompetent.

Objection overruled. Exception.

"A. Yes, I did rely on the rule stated by me in answer to the foregoing interrogatory when I delivered my picture 'Chorus' to the Royal Academy for exhibition. I did not make any special arrangement or agreement either in writing or verbally with the Royal Academy with reference thereto. As a matter of fact, if any such arrangement or agreement had been suggested by me with reference thereto, it would not have been for a moment entertained by the Royal Academy. The rules are made by the Royal Academy independently of the exhibitors at the exhibition, and they cannot in any way be altered by special arrangement or agreement with the exhibitors. The said rules are all framed by the Royal Academy in the interests of the general body of exhibitors; and there is an express rule of the Royal Academy that permission is not to be granted either to the pubic or visitors to the Royal Academy exhibitions to copy said pictures at and during the time of the annual exhibitions.

"R. D. Q. 5. Have you ever seen any copyright notice printed on or attached to any of the pictures exhibited at the exhibitions of the Royal Academy, or to their frames?

Same objection, ruling and exception.

"A. No, I have never seen any copyright notice printed on or attached to any of the pictures exhibited at the exhibitions of the Royal Academy, or to their frames.

"R. D. Q. 5. If you have stated that no special agreement
28 or arrangement was made between you and the Royal Academy concerning any copying of the picture 'Chorus'

while it was on exhibition, state whether it was your understanding that the Royal Academy might allow the public, or visitors, or anybody to copy said picture, and under what circumstances it should or would take any measures to prevent such copying.

Same objection, ruling and exception.

"A. No; it was certainly not my understanding that the Royal Academy might allow the public or visitors, or anybody, to copy said picture. It is a strict rule of the Royal Academy that a copying of the pictures while on exhibition is strictly forbidden, even to the extent of a small pencil sketch.

"R. D. Q. 7. Do you know whether the Royal Academy received said pictures under the same understanding as to copying explained by you heretofore? If so, state how you know this to be a fact.

Same objection, ruling and exception.

"A. Yes, certainly. I know this to be a fact from an experience that I have had of thirty years as an exhibitor at the annual exhibitions at the Royal Academy.

"R. D. Q. 8. Did you know at that time what the rule of the Royal Academy was with reference to removing the pictures from the exhibition before the exhibition closed? If so, please state what the rule was with reference to allowing such removal?

Same objection, ruling and exception.

"A. Yes, I did know at that time what the rule of the Royal Academy was with reference to removing the picture from the exhibition before the exhibition closed. The rule was what it has always been since I have had to do with the Royal Academy that the picture was not to be removed before the exhibition closed.

29 As I have already testified, I sold the picture 'Chorus' in October, 1899, to Mr. Vincent Cotterell, and I did inform him as the purchaser of said picture before the time of said sale that I had previously sold the copyright of the picture to Emil Werckmeister."

"Re-X Q. 1. If you answer the first redirect interrogatory, to what person, giving his name, place of abode and official title, did you give or send the instructions in said first redirect interrogatory inquired about, and were such instructions in writing, and, if they were, produce a copy thereof to be annexed to your deposition, and if such instructions were verbal, state exactly what you said?

"A. I gave no instructions as those inquired about in the first direct interrogatory as I have already stated in my reply thereto. The Council of the Royal Academy do not permit any such instructions to be given to them by any exhibitor. As I stated in my reply to the first redirect interrogatory, I did enter in the Royal Academy sale book the price that I wanted for the picture. I have not a copy thereof, but so far as I remember, it was to this effect: first of all appeared the number of the picture; then under the word 'Title' I wrote 'Chorus; then under the word 'price' I wrote '£500, copyright reserved'; and under the words 'Artist's name' I wrote the words 'W. Dendy Sadler.'

"Re-X Q. 3. If you answer the eighth redirect interrogatory, state whether or not the rule referred to therein was in writing. If so, produce the same or a true copy thereof and of the whole thereof.

Same objection, ruling and exception.

"A. I believe the said rule is in print, but I have not a copy of it, and I have never seen it; but it is common knowledge amongst exhibitors at the Royal Academy that they cannot remove their pictures before the close of the exhibition, and, as a matter of fact, the Royal Academicians themselves cannot do so.

30 "I have already stated that the name of the purchaser of my said picture 'Chorus' is Mr. Vincent Cotterell, and that his place of residence is 76 Grosvenor street, in the County of London. The transaction with the purchaser was neither wholly nor partly in writing. It was entirely by word of mouth. Mr. Vincent Cotterell, who is a dentist, is an old friend of mine, and whilst dining with him some five years ago I casually remarked to Mr. Vincent Cotterell that I had never sold the picture; whereupon he asked me what I would take for it, and after some haggling we struck a bargain that I should sell the picture for £300, and the said picture was handed by me to him within a week. I was apprenticing my son to him, and he required £300 for the apprenticing of my son, and in payment of this £300 I handed him over the picture. He knew perfectly well at the time of my handing over the said picture to him that I had already sold the copyright of the said picture as he had the original photogravure, issued by the Berlin Photographic Company, hanging in his hall."

Complainant offers in evidence the deposition of Frederick Alexis Eaton.

The deposition is as follows:

FREDERICK ALEXIS EATON testified:

"My name is Frederick Alexis Eaton; I am of full age; my business residence is at the Royal Academy of Arts, Piccadilly, in the County of London, England, and I am Secretary to the said Royal Academy of Arts. I am a British subject and I have been so all my life. I am Secretary of the Royal Academy at London, England, and I have been such secretary for more than 29 years last past.

The Royal Academy does conduct exhibitions of pictures in London, and as secretary my duties or functions are to supervise everything connected with such exhibition; in fact I am the execu-

31 tive officer of such exhibitions acting under the orders of the president and council of the Royal Academy.

Yes, there was an exhibition of pictures held by the Royal Academy in London, in 1894, which commenced on the first Monday in May of that year and ended on the first Monday of August of that year.

As I have already stated in my reply to the fourth interrogatory,

I am the executive officer of the Royal Academy acting under the orders of the president and council, and I discharged the same duties in the year 1894, as in all other years, and I exercised the same general supervision over everything in connection with the exhibition of pictures in all the other years during which I have been secretary of the Royal Academy.

The public was not admitted to that exhibition free of charge, but had to pay sometimes a shilling and sometimes sixpence for admission. The usual fee charged to the public for admission to that exhibition was a shilling, but in the last week of that exhibition it was open to the public in the evening at sixpence, and on the first Monday in August the fee charged to the public was sixpence all day and all the evening.

"Q. 8. Please state whether the visitors at said exhibition of the Royal Academy in the year 1894 were allowed to make any copies of the pictures there exhibited. If yea, state under what circumstances such copying was allowed?

Objected to as incompetent, irrelevant and immaterial.

"A. I answer this interrogatory absolutely in the negative.

"Q. 9. Has the Royal Academy any rule with reference to permitting the copying of pictures at its annual exhibition, and if so, please state what the rule is and how long it has existed and been in force?

Same objection, ruling and exception.

32 "A. No, there is no such rule permitting copying; on the contrary, by Section 7, Clause 20 of the 'Abstract of the Constitution and Laws' of the Royal Academy of Arts, it is laid down that: 'No permission to copy works during the term of exhibition, shall, on any account be granted.' This rule has been in force ever since I have been secretary of the Royal Academy.

The rule as to non-copying referred to in my last answer is printed in a book which is only for the use of academicians, and is not issued to the public. As I have already testified in my reply to the last preceding interrogatory it has been in existence ever since I have been secretary to the Royal Academy. It is a council by-law which was passed at a council meeting on the 6th day of May, 1847. The reason for their doing so appears on a minute of the council made on that occasion, of which the following is an exact copy: 'That so much property in copyright being entrusted to the guardianship of the Royal Academy, the council feel themselves compelled to disallow, in future, all copying within their walls from pictures sent for exhibition.'

"Q. 11. How is said rule as to the copying of pictures, if any, enforced during the exhibitions of the pictures by the Royal Academy?

Same objection, ruling and exception.

"A. There are three or more detectives in plain clothes always perambulating the rooms in which the pictures are exhibited, and if they see anybody copying the pictures they immediately stop

them, and if any person persisted in his or her endeavors to copy any picture after being told not to do so he or she would be expelled, and therefore, as a matter of fact, the public are never permitted or allowed the opportunity of copying any pictures on exhibition, and so rigidly is this rule enforced that no photograph is ever allowed to be taken of any of the pictures while on exhibition.

33 "Q. 12. Is said rule, if any, brought to the attention of the visiting public at said exhibition, and if so, in what manner?

Same objection, ruling and exception.

"A. No; except in the manner I have already testified to in my reply to the last preceding interrogatory that if they are caught by the plain clothes detectives in the act of copying the pictures they are stopped. Beyond that, there is no publication of the rule to the public.

"Q. 13. State whether said rule, if any, was in force and enforced at the exhibition conducted by the Royal Academy during the year 1894 above mentioned?

Same objection, ruling and exception.

"A. Said rule was in force at the exhibition conducted by the Royal Academy during the year 1894, but whether there was any occasion to enforce it I do not know.

I have never seen on any of the paintings exhibited at the exhibitions of the Royal Academy in London, or upon the frames of said paintings any notice or notices referring to some copyright.

"Q. 15. Is it the custom of the artists who exhibit their works at the annual exhibitions of the Royal Academy to make any arrangement with the Royal Academy, its directors or officers, with reference to allowing the public to take copies of the pictures there exhibited? If so, please state what arrangement is made?

Same objection, ruling and exception.

"A. No; it is not the custom of the artists who exhibit their works at the annual exhibitions of the Royal Academy to make any arrangement with the Royal Academy, its directors or officers, with reference to allowing the public to take copies of the pictures there exhibited.

34 "Q. 16. In what building are the exhibitions of the Royal Academy held in London?

"A. The exhibition- take place in the galleries of the Royal Academy, which galleries were built by the Royal Academy on a portion of the garden of old Burlington House, Piccadilly.

"Q. 17. If you have stated that no particular agreement or arrangement is made by the artists sending their pictures to the Royal Academy for exhibition, what is your understanding as to the right of the Academy to copy the same or allow copies to be taken thereof by the visiting public or anybody else?

Same objection, ruling and exception.

"A. All I can say, is, that during my long experience as secretary of the Royal Academy, the Council, as a body, have never copied any of the pictures which have been exhibited in the galleries of the Royal Academy or allowed other people to do so while the pictures have been on exhibition in the galleries of the Royal Academy.

"Q. 18. How long have you had and acted on the understanding between you and the exhibiting artists described by you in answer to the foregoing question?

Same objection, ruling and exception.

"A. The rule as to non-copying of the pictures while on exhibition in the galleries of the Royal Academy has been in force ever since I have been secretary of the Royal Academy.

Cross-examination:

"I was the secretary of the Royal Academy of Arts during the time of its exhibition in the year 1894, in London, England. Said exhibition in the year 1894 opened the first Monday in May in that year, and closed the first Monday in August in the same year. The exhibition was open to the public on each week day, except the first day, during the same period, from 8 o'clock forenoon until 7 o'clock afternoon. The public generally were admitted to said exhibitions on each week day upon the payment of one shilling per admission. There was a private view day of the press on Wednesday, May 2d, the whole day, and one on Thursday, May 3d, up till one o'clock, and then the rest of that day was the royal private view day. There was a general private view day on Friday, the 4th, and the dinner was on Saturday, the 5th. No charge for admission was made on any of those days. The members of the said Royal Academy of Arts and the associate members of said Royal Academy of Arts and artists exhibiting at said exhibition, were entitled to free admission to the exhibition. Members and exhibitors and the wives and children of members all came into the exhibition when they liked, but we did not keep a special register of their admission. I have no doubt that during the season they did aggregate a large number. The public generally visit the said exhibition in large numbers on each of the public days thereof.

"I have testified that the Royal Academy has no rule with reference to permitting the copying of pictures at its annual exhibition, but that there is a by-law to the contrary effect, the exact language of which I have set out in the said 9th direct interrogatory, and I have given the full particulars as to where said by-laws is to be found printed, when it was passed by the council, for whose use it is and how it is enforced in my replies to the 9th, 10th and 11th direct interrogatories. I do mean that visitors to said exhibitions are not at liberty to bring easles, canvass and painting materials, and copy paintings during the exhibition. I have never received any letters, telegrams and other paper writings touching the subject-matter of this, my deposition.

"X-Q. 20. Was the picture 'Chorus,' by W. Dendy Sadler, exhib-

ited at the exhibition of 1894, and if you answer yes, state by
36 whom it was exhibited and whether or not it was for sale?

"A. Yes; the picture, 'Chorus,' by W. Dendy Sadler, was exhibited at the exhibition of 1894, and it was for sale,

"Redirect examination:

"R. D. Q. 1. Has the Royal Academy any rule concerning the removal of the exhibited pictures from the exhibition during the time of the exhibition? If so, what is it, and was this rule in force during the year 1894?

Same objection, ruling and exception.

"A. Yes. By Section 7 of Clause 6 of the 'Abstract of the Constitution and Laws' of the Royal Academy it is laid down in the following words. 'No work, when received and admitted, shall be taken away on any pretence before the exhibition for the year ends.' This is a rule which has been in force for very many years, and was in force during the year 1894.

"R. D. Q. 2. Was a person who intended to purchase any of the pictures exhibited at the Royal Academy exhibition of the year 1894 at liberty to take possession of such picture during the time while said exhibition was open, and if so, under what circumstances?

Same objection, ruling and exception.

"A. No; absolutely no.

"R. D. Q. 3. If you have heretofore testified that persons attending the exhibitions of the Royal Academy are not permitted to copy the paintings exhibited thereat, did you mean that every kind of copying is forbidden at the exhibition, whether by painting, drawing, photographing or in any other manner?

Same objection, ruling and exception.

"A. Yes; I did mean that every kind of copying is forbidden at the exhibition, whether by painting, drawing, photographing or in any other manner.

37 "R. D. Q. 4. Is the rule as to copying at the exhibition to which you have referred a rule of convenience so as to provide against any undue interference with the convenient inspection of the pictures by the visiting public, or is the rule designed and enforced to preserve the exhibitors' rights in the pictures?

Same objection, ruling and exception.

"A. This rule has been in force for more than thirty years. I found it in force when I became secretary of the Royal Academy, but the reason why the rule was passed appears in my reply to direct interrogatory No. 10.

"R. D. Q. 5. Does the Royal Academy give any assurance to the exhibiting artists respecting the preservation of their rights in the exhibited pictures during the exhibitions, and if so, what assurance does it give them and in what manner.

Same objection, ruling and exception.

"A. No.

Recross-examination read by complainant in evidence:

Under same objection by defendant. Objection overruled. Exception.

"The rule referred to in the first redirect interrogatory and in my answer thereto was passed by the Council of the Royal Academy on December 30, 1768; it was then approved by the General Assembly in January, 1769, and it was sanctioned by the Sovereign in the last mentioned year. This rule is recorded in the minutes of the Council, in the minutes of the General Assembly and in what is called 'The Royal Book,' in which all rules requiring the Sovereign's signature have to be entered, and the said book goes to the Sovereign for his signature to every such entry. I have al-
38 ready set out in my answer to the first redirect interrogatory a true and correct copy of the said rule.

"Re-X Q. 2. If you answer the second redirect interrogatory, state whether or not the matter thereof was the subject of the rule, and if so, when the rule was adopted, by whom it was adopted, in what book or record it was recorded, and produce a true copy thereof and of the whole thereof?

Same objection, ruling and exception.

"A. Yes; it was the subject of the rule I have already quoted in my reply to the first redirect interrogatory, and I have already stated in my reply to the first recross interrogatory when the rule was adopted, by whom it was adopted, and in what book it was recorded. I cannot produce a copy thereof to be annexed to my deposition but I have set out the exact language of the rule in my reply to the first redirect interrogatory.

Defendant reads in evidence the following:

"It is a fact that an official catalogue for the year 1894 of the paintings exhibited in the galleries of the Royal Academy was published about the time of the opening of said exhibition, but such official catalogue published by the Royal Academy was not in any way illustrated. I have seen reproductions of some of the pictures exhibited at the exhibitions of the Royal Academy published in some of the English illustrated newspapers and magazines, but these are in no way official and are not even in the letter press portion complete copies of the Royal Academy Official Catalogue."

39 Complainant offers in evidence the following deposition of Sir Lawrence Alma Tadema, Knight:

"My name is Lawrence Alma Tadema; I was created a knight of the United Kingdom of Great Britain and Ireland in the year 1899; my age is 67 years and upwards; I reside at No. 34 Grove End Road, St. John's Wood, in the County of London, England, and I am by profession an artist; and also an Academician of the Royal Academy of Arts, Piccadilly, in the County of London, England.

"I am acquainted with the exhibitions of pictures annually conducted by the Royal Academy at London, England. The first exhibition of pictures at the Royal Academy I attended as a visitor

was in 1862, and the first time I exhibited my pictures was in 1869 on the opening of the new building of the Royal Academy. In the year 1876 I was elected an associate of the Royal Academy, and in 1879 I was elected a full member of the Royal Academy—an Academician—and I have been a member of the Council of the Royal Academy five times since my election as a full member and served for a period of two years on each of those occasions except the fifth, which has not yet terminated.

"The annual exhibitions of the Royal Academy are held in the buildings of the Royal Academy, Piccadilly, in the County of London, and they last from the first Monday in May until the first Monday in August. The galleries of the Royal Academy where the annual exhibitions are held are really built on part of the gardens of Old Burlington House, Piccadilly, London. I have myself exhibited pictures at the annual exhibitions of the Royal Academy from the year 1869 to the year 1902, both years inclusive.

"Q. 9. Do you know what the rule or custom of *of* the Royal Academy is with reference to permitting the public or visitors of the exhibitions to make copies of the pictures exhibited at the annual exhibitions? If so, please state it?

Objected to as irrelevant and immaterial. Overruled and exception.

"A. No such thing is or would ever be allowed as that of permitting the public or visitors to the exhibitions to make copies of any pictures exhibited at the annual exhibitions—not even notes. I recollect that on one occasion Mr. Linley Sanborne, the well known artist on *Punch*, complained to me of having been roughly handled by the servants of the Royal Academy for endeavoring to sketch on his shirt cuff a picture of Sir Edward Burne-Jones, and for persisting in doing it after being told not to do so, and I told him that he had to expect that sort of treatment for doing such a thing, as it was not allowed by the rules of the Royal Academy.

"Q. 10. Has the rule or custom described by you in answer to the last interrogatory been the same in previous years? If so, please state since when it has been in existence and enforced?

Same objection, ruling and exception.

"A. Yes, I do not think it has ever been otherwise; certainly not during my time.

"Q. 11. Have you ever seen any copying of pictures done during and at the exhibitions of the Royal Academy above described by you? If so, please state under what circumstances?

Same objection, ruling and exception.

"A. No, I have never seen any copying of the pictures done during and at the exhibitions of the Royal Academy.

"Q. 12. Does the Royal Academy keep any custodians in the gallery where the pictures are exhibited at its annual exhibition to en-

41 force the rules and regulations of the Academy with reference to the copying of pictures? How long have you known the condition described by you in answer to the last interrogatory to exist?

Same objection, ruling and exception.

"A. Yes; besides the various officials of the Royal Academy in uniform, whose duty it is to see that the pictures are in no way damaged, there are also persons employed by the Royal Academy who are in plain clothes whose duty it is to see that the rule against copying of pictures which are exhibited at the annual exhibitions is strictly enforced, and I have personally known of the existence of this rule from the first year that I exhibited my pictures thereat.

"Q. 13. What is your understanding as an exhibitor and as a member of the Royal Academy with reference to the rights which the Royal Academy has in the pictures delivered to it by the exhibitors for exhibition, and particularly with reference to taking or making copies thereof, and allowing copies thereof to be made?

Same objection, ruling and exception.

"A. My understanding as an exhibitor and as a member of the Royal Academy is, that the Royal Academy has no right to take or to make or to allow copies of any pictures exhibited at their annual exhibitions to be made, but they are expected to protect the rights of the exhibitors, and the rule which they enforce against the copying of pictures by the public is strictly enforced in order to protect the rights of the exhibitors.

"Q. 14. How long have you had and held the understanding described by you in answer to the last interrogatory with reference to the relations between exhibiting artists and the Royal Academy?

Same objection, ruling and exception.

"A. As long as I have been connected with the Royal Academy.

42 Complainant's counsel offers the certificate of copyright issued to the plaintiff on April 16, 1894, by the Librarian of Congress.

Defendant objects to it as incompetent and as not being in conformity with the Act of Congress, and that no right can be maintained upon it.

By DEFENDANT'S COUNSEL: The certificate describes the Photographische Gesellschaft as proprietors of the painting, or inferentially the proprietors of the painting, whereas the evidence shows they were not proprietors of the painting. The statute does not permit any one but the proprietors of the painting to take copyright; but if it did, the certificate should truly describe the applicant as proprietors of the copyright and not of the painting, and upon a false statement or a false certificate no right to issue can be founded; and also on the further objection that no photograph accompanied that deposition that was sent to the Librarian.

Defendant objects to it on the further ground that the photograph

itself is not here, and therefore the statement of the Librarian is not competent evidence of the fact, and on the further ground that the Act of Congress requires first a description to be filed and afterwards a photograph, and no such thing was done. They filed a description, but they did not file the photograph except as they filed the photograph with the description, and that does not comply with the act.

Objection overruled. Exception by defendant.

Marked Plaintiff's Exhibit E, and the following is a copy thereof:

"Photographische Gesellschaft, Berlin, Germany,

"BERLIN, *March 31st*, 1894.

"To the Librarian of Congress, Washington, D. C.
150 Painting. Photo on file.

"SIR: Please find enclosed Doll. 1.50 for record fee and certificate of copyright for a painting by W. Dendy Sadler entitled
43 'Chorus' of which we are the proprietors of the copyright and of which the following is a description:

"A company of gentlemen with filled glasses singing in chorus.

"We also enclose a photograph of the painting as required by law, and request that the certificate of copyright be sent to the care of the Berlin Photographic Company, 14 East Twenty-third Street, New York City.

"Very respectfully,
PHOTOGRAPHISCHE GESELLSCHAFT.

"Library of Congress.

Copyright.
194882 Apr. 16, 1894,
Washington, D. C.

"I hereby certify that the above is a complete and correct copy of the letter of application for copyright registration made by the Photographische Gesellschaft, Berlin, dated March 31, 1894, and received at the Copyright Office on the sixteenth of April, 1894, for entry of a painting by W. Dendy Sadler, entitled 'Chorus' and with such marks, in addition, as were put upon the letter of application after its receipt in the Copyright Office to show that the $1.50, the amount of the fee, was duly received, that the photograph required was on file, and giving the date of the entry and the entry number. In witness whereof, the seal of Congress has been hereto affixed, this twenty-fifth day of August, 1902.

"HERBERT PUTNAM,
Librarian of Congress,
By THORWALD SOLDBERG,
Register of Copyrights."

44 Plaintiff offers in evidence the deposition of the witness Ludwig H. Schutze:

"LUDWIG H. SCHUTZE, having been first duly sworn by Henry B. Gayley, Notary Public, testifies as follows:

"Direct examination by Mr. KNAUTH:

"Q. 1. Please state your name, age, residence and occupation?

"A. Ludwig H. Schutze; age, thirty-four; residence, Flatbush, Long Island; occupation, manager Berlin Photographic Company, New York. I know the plaintiff Emil Werckmeister. I have been in the employ of the plaintiff since the year 1889, first in Berlin, and since the fall of 1892 over here in New York City. The Berlin Photographic Company at 14 East Twenty-third street is the American branch of Mr. Werckmeister's business. I have been the manager of that branch in New York City since the beginning of 1894, and am such manager now. I am about to leave this country, about the middle of August, 1903, probably permanently. I intend to go to Europe.

"Q. 12. I have here a certified copy from the Register of Copyrights of a letter addressed to Librarian of Congress, dated March 31st, 1894, and signed 'Photographische Gesellschaft' (Exhibit D). Have you any recollection of sending such a letter to the Librarian of Congress? If so, please state what you know about the letter and the manner in which it was mailed?

"A. Yes; this letter addressed to the Librarian of Congress was sent us by our Berlin house, and we forwarded it to the Librarian of Congress, with a fee of a dollar and fifty cents for copyright entry.

"I also enclosed in the letter a photograph, such as is stated therein. The photograph represented a group of men, some of them sitting around a table, one of them standing, with a glass in one hand and with a pipe in the other, and the others evidently singing in chorus. I can identify the photograph. This is a copy of
45 the picture of which we sent a photograph (indicating the photogravure picture, Exhibit B). It was identical in design with the photogravure picture which I have produced. The photograph which I sent to the Librarian of Congress in the letter of March 31st, 1894, was rather a smaller size, about cabinet size. That photograph was sent us from Berlin, together with this letter of application for copyright, of March 31st, 1894."

Mr. JENNER: I move to strike out the last two sentences of the answer beginning, "The photograph which I sent to the Librarian of Congress in the letter of March 31st, 1894, was rather a smaller size, about cabinet size. The photograph was sent us from Berlin, together with this letter of application for copyright, of March 31st, 1894," on the ground that it does not appear that that photograph was a photograph of the painting itself.

Motion denied. Exception by defendant.

"Q. 31. Now what do you know about the marking of the copies of this picture 'Chorus' which you sold in this country?

"A. On the plate margin there is an engraved notice which reads 'Copyrighted 1894 by Photographische Gesellschaft.' This notice of copyright was contained on all the copies of said picture which I sold in this country, the small as well as the large ones.

"Q. 96. Had you previously had any conversation with the American Lithographic Company or any of its officers or agents with reference to this picture 'Chorus'?

"A. Yes, I had.

"Q. 97. State when and where and what was said?

"A. In December, 1900, a Mr. Chapin of the American Lithographic Company, called at my office to inquire whether the Berlin Photographic Company would authorize the American Lithographic Company to use the picture 'Chorus' for an advertising poster."

46 Mr. JENNER: I move to strike out the answer on the ground that there is no evidence to show that Mr. Chapin had anything to do with the company.

Mr. KNAUTH: We will prove hereafter that Mr. Chapin was a salesman for the defendant company. We expect to prove it through the officers of the defendant company.

Objection overruled. Exception by defendant.

"The WITNESS (continues): He offered one hundred dollars in payment of such permission, and stated at the same time that the American Lithographic Company would issue the poster anyway, if the permission should not be granted. I replied that I did not see my way to grant such permission, but should refer the matter to our Berlin office. I subsequently informed the American Lithographic Company, in January, 1901, that our Berlin office declined to authorize the use of the picture 'Chorus' for advertising purposes."

Mr. JENNER: I move to strike that out. It states a conclusion. It does not either state what he said or wrote.

Motion denied. Exception by defendant.

The COURT: I am receiving it with their promise that they can and will prove that this agent Chapin either had authority to do what he was doing or that it was brought to the attention of the defendant here, and that they approved in writing of it. Of course that may stand. At this time it is incompetent. It goes simply to the order of proof, if they make it.

CHARLES EDDY, called as a witness for the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. KNAUTH:

I am the Secretary of the American Lithographic Company, the defendant in this action. I have been secretary of that
47 company since 1901. February I think was the month. I have been served with a subpœna in this action.

Q. Will you produce it?

By Mr. JENNER:

Q. Mr. Eddy, are you a stockholder of the American Lithographic Company?

A. Yes, sir. I have been a stockholder some ten or twelve years.

Mr. JENNER: I base the objection on the ground that this action is brought under Section 4965 of the Revised Statutes, a highly penal statute, as it declares a penalty of $10 for each sheet, irrespective of the damages which the plaintiff may have sustained by the alleged infringing act and of the amount of profit which the defendant may have made from the alleged infringing acts.

I also object on the ground of Sections 724 and 860 of the Revised Statutes.

Section 724 does not refer to an individual defendant. It mentions parties, corporations are parties, and also Section 860.

I object to the witness now on the stand answering any question which tend- to render the defendant in this suit liable to a penalty, and I claim that he is privileged from answering and that the defendant is privileged from giving testimony either by books or by officers, under Revised Statutes, Sections 724 and 860, the Fourth and Fifth Amendments to the United States Constitution, and Fourteenth Amendment.

I have a separate objection which I shall present by and by to the subpœna *duces tecum*, but it is not pertinent to this particular matter.

The COURT: I will overrule your objection and give you an exception.

Exception by defendant.

48 By Mr. KNAUTH:

Q. Did you produce the subpœna?

A. Yes, sir (producing paper).

Q. Show it to me, please? (Paper handed to counsel.)

Mr. KNAUTH: I will offer the subpœna in evidence.

Mr. JENNER: I want to object to the subpœna, and I put the objection on this ground. I assume in the absence of a Federal statute regulating the issuance of subpœnas *duces tecum* that the State law controls, the State code controls, under the section of the Revised Statutes which conforms the pleadings, practice and procedure in the Federal courts to the courts of the respective States except proceedings in equity and admiralty. Section 852 of the Code of Civil Procedure in the State of New York provides that the original subpœna must be exhibited to the witness, and a copy of the subpœna, or a ticket containing its substance, must be delivered to him. It also provides that the subpœna must be served at least five days before the day when the witness is required to attend. This was served the day before. It also provides that it must be served upon the president or other head of the corporation, or to the officer thereof in whose custody the book or paper is. So that the subpœna does not seem to be regular.

Mr. KNAUTH: I understand the witness was subpœnaed a week ago, Monday of last week, more than five days ago.

Mr. JENNER: For the following day.

Mr. KNAUTH: Certainly, and since then he has been regularly in court from time to time, and your Honor has directed the witnesses to appear the following day, and this witness has appeared consecutively until last Friday, and was then requested to appear here to-day in answer thereto. It seems to me that point is not well taken. Are we to serve him over and over again with new subpœnas every time that the trial is adjourned?

49 Mr. JENNER: You must have your first subpœna regular.

Mr. KNAUTH: He is here in answer to the subpœna. Isn't he here in answer to the subpœna?

The COURT: He is here. We will see what he has got. I will overrule the objection.

Exception by defendant.

The paper produced by the witness is marked Plaintiff's Exhibit F, and the following is a copy thereof:

The President of the United States of America, to Robert M. Don-
[L. S.] aldson, Charles Eddy, Louis Ettlinger, Greeting:

"We command you, that all business and excuses being laid aside, you appear and attend before Hon. C. N. Hough, United States Circuit Judge, at the United States Circuit Court of the Southern District of New York, at the Court Rooms in the Post Office Building in the City of New York, Borough of Manhattan, on the 30th day of October, 1906, at 11 o'clock in the forenoon, to testify and give evidence in a certain action now pending undetermined in the circuit — of the United States for the Southern District of New York, between Emil Werckmeister, plaintiff, and American Lithographic Company, defendant, on the part of the plaintiff, and that you bring with you and produce at the time and place aforesaid, all business books of said defendant, containing entries relating to the manufacture and sale by it of certain posters or chromos called "Here's to Old English," also all correspondence with the American Tobacco Company relating thereto, and all receipts executed by that company for such posters, orders for delivery and all memoranda relating to such manufacture and sale between July 1, 1901, and July 1, 1903, now in your custody, and all other deeds, evidences and writings which you have in your custody or power con-
50 cerning the premises. And for a failure to attend you will be deemed guilty of a contempt of court and liable to pay all loss and damage sustained thereby to the party aggrieved and forfeit two hundred and fifty dollars in addition thereto.

"Witness the Hon. Melville W. Fuller, Chief Justice of the United States, at the Borough of Manhattan, in the City of New York, the 18th day of October, 1906.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

Q. Have you brought any of these books?

A. I have not.

Q. Why haven't you brought them?

A. There are no such books or papers as are mentioned in this paper in my custody.

Q. What are your functions as secretary of the American Lithographic Company?

A. As secretary I keep the minutes of the meetings of the Board of Directors; I attest the seal of the company when necessary, and attend to some little correspondence. I have general supervision over the manufacturing departments at Nineteenth street and Fourth avenue, since February last, I think it was. Before February last I was the purchasing agent for several years, my recollection is from June, 1901, up to this period when I took the other occupation, in February last. I did my business during that period at the company's office, Nineteenth street and Fourth avenue. During those years I was only purchasing agent—I was secretary and purchasing agent. I have been secretary since February, 1901.

Mr. JENNER: I suppose it is understood and agreed to by the plaintiff that my objections under Sections 724 and 860 and the Fourth, Fifth and Fourteenth Amendments apply to each of these questions, and the objection is overruled, and I have an exception on each of the rulings. I do not want to take up time and interrupt the examination.

51 The COURT: So as not to encumber the record, you may regard every question is under the same objection, ruling and exception.

As secretary of the company I am in possession of the minutes of the Board of Directors. I did not understand that I was required to bring it here.

Q. Why didn't you understand it so?

A. If you will give me the paper to read, I will try to tell you. "All business books of said defendant, containing entries relating to the manufacture and sale by it of certain posters or chromos called 'Here's to Old English.'" There are no entries in that book in regard to that that I am aware of. I am sure of that. I kept those records—that is, during the time I kept the records. I do not know anything about an agreement made between the American Tobacco Company and my company that my company should indemnify the American Tobacco Company for the use of these posters.

Q. Have you never had any knowledge of such an understanding or agreement between these two companies?

A. I never had any such knowledge; no, sir.

Q. Have you had any knowledge at all of the manufacture of such posters as the one I now show you, the picture you call "Old English"——

The COURT: Why don't you have it marked for identification?

Marked for identification, Plaintiff's Exhibit G.

Mr. JENNER: I object to that on the ground of Sections 724 and 860 and the Fourth, Fifth and Fourteenth Amendments—the privilege to the defendant.

Objection overruled. Exception by defendant.

Q. I now show you a picture called, "Here's to Old English," and ask you whether you ever saw these pictures again or pictures like them?

A. I do not remember ever seeing it.

52 Q. Do you mean to say that you never saw pictures like this Exhibit G before?

A. I have no recollection of seeing it, no sir.

Q. Who is the president of your company?

A. Mr. Joseph P. Knapp.

Q. Where is he?

Mr. JENNER: I object to that; it is not relevant to any allegation of the complaint where he is.

The COURT: It seems to me evident that they are trying to show from the officers of the company or men connected with it that they either made and sold or bought or had something to do with pictures copied from this one that they have described here as "Chorus," that painting which they have copied they claim an infringement of. It seems to me it is relevant that they are trying to get proof here that they made it and sold it.

Mr. JENNER: To the issue whether it made or sold the alleged criminating sheets, it seems to me the present whereabouts of Mr. Knapp is not at all relevant; it does not tend to shed any light on the case.

The COURT: I do not know about that; it might and it might not. He may answer.

Exception by defendant.

Q. Where is the president of your company?

The COURT: If he knows.

A. I do not know where Mr. Knapp is.

Q. Has not Mr. Knapp, the president, been away from the company's office for some time past?

Mr. JENNER: I object to that on the same grounds as immaterial and irrelevant to the issue.

The COURT: He may answer.

Exception by defendant.

A. I think he was at the office on Friday, sir.

Q. Last Friday?

A. Yes, sir.

Q. Did you confer with him about the subpœna which had been served upon you?

A. No, sir.

53 Q. Did you mention it to him?

A. No, sir.

Q. To whom did you mention it?

A. I mentioned it to Mr. Ettlinger and then to Mr. Donaldson.

Q. Now, sir, tell us what had you to do with the business of

manufacturing by the defendant, the American Lithographic Company, previous to January, 1906?

A. I was purchasing agent from, I think it was, May or June, 1901, up to the time that I took my present position, I think it was in February last.

By the COURT:

Q. I want something here that is intelligent. What is the business of your company?

A. The lithographic and printing business.

Q. You are engaged in that?

A. Yes, sir.

Q. You make the lithographic pictures?

A. Yes, sir.

Q. And sell them and put them out, is that it?

A. Well, as a rule we sell them first, yes, sir; and take orders for lithographs.

Q. You take orders for them?

A. Yes, sir; and then print them for our orders, as a rule.

Q. And deliver them yourselves?

Mr. JENNER: I object to that question on the statutory ground.

Objection overruled. Exception by defendant.

To Mr. KNAUTH:

We make lithographs in colors. That has been the business of our company since its incorporation since before 1901.

Q. Now, how long have you been doing business with the American Tobacco Company?

Mr. JENNER: I object to that on the statutory and constitutional grounds that the defendant and witness is protected under
54 Sections 724 and 860 and the Fourth, Fifth and Fourteenth Amendments.

Objection overruled. Exception by defendant.

A. Several years, I should say eight or ten years. I do not know of deliveries of lithographic matter to them.

Q. What did you do in the manufacturing business of the defendant company previous to January, 1906?

A. It is a little difficult for me to answer. In 1897 we moved into a building, where we are now, corner of Nineteenth street and Fourth avenue, and for a time I was superintendent of the manufacturing department. In 1898, I think it was, I was ill, and had to give up the position and went away for some months; and I do not think I had any connection with the manufacturing departments then, excepting in a general way, until last February.

Q. Did the defendant company in its business have any departments in which certain kinds or classes of lithographic work were done; did they make different lithographs in different departments?

Mr. JENNER: I object to that on the same grounds.

Objection overruled. Exception by defendant.

A. Yes, there are certain divisions. One division is rooms where we lithograph—I am speaking of the lithographic printing now—cigar labels almost exclusively, and the other is the general—what we term commercial lithography. In the general or commercial lithographic department, all kinds of lithographs, posters, blotters, cards; almost anything that could be lithographed was made.

Q. Have you ever known a Mr. Chapin in the employ of that company?

A. Yes, sir.

Q. How long did you know him?

Mr. JENNER: I object to that on the same grounds.

Objection overruled. Exception by defendant.

55 A. I think I knew Mr. Chapin for eight or ten years. I do not know where he is now. I do not remember when I saw him last, sir. I passed him on Broadway about a year ago, as near as I can remember. He is not in the employ of the company now, sir.

Q. When did he leave them?

Mr. JENNER: Same objection.

The COURT: All of this is under your objection.

Exception by defendant.

A. I could not tell you exactly; I have not seen him about there for a couple of years, I think.

Q. What was his position with the company previous to that time?

A. I decline to answer.

Q. Why do you decline to answer?

A. On the ground that it may tend to inflict a penalty of forfeiture upon the American Lithographic Company, and thus upon me as a stockholder.

Mr. KNAUTH: I ask your Honor to instruct the witness that he has to answer the question.

The COURT: Yes, answer the question, under objection.

Q. (Repeated.) What was his position with the company previous to that time?

A. He was a salesman. I do not know what he sold. We do printing.

I said in February, 1906, I took the general supervision. Previous to that time I was expected to give some care to the manufacturing, but not to devote much time to it. It is not a fact that previous to 1906 I had a general supervision over the entire manufacturing business of the defendant company.

Q. Is it not a fact that you had a general knowledge of the entire manufacturing business?

Mr. JENNER: Same objection on the statutory ground.

Objection overruled. Exception by defendant.

56 A. I could not say that; no, sir.

Q. Who had charge of the business books of your company?

Same objection, ruling and exception.

A. The books of account are in charge of the auditor, Mr. C. E. Walker. I saw him this morning.

Q. What books does your company keep?

Same objection, ruling and exception.

A. I do not know, sir.

Q. Don't you know that they keep a ledger?

A. Yes, sir, they keep a ledger. I don't know that they keep a journal.

Q. What books are kept in your department, the manufacturing department?

A. They keep books showing the amount of work done on various orders now.

Q. Was not that the case when you had charge of this manufacturing company in 1897 or 1898?

A. I do not know, sir.

Q. Who keeps these books? Is there a special clerk or officer designated for that purpose?

Mr. JENNER: I object to that as irrelevant, immaterial and improper; and also under the statutory grounds and constitutional grounds.

Objection overruled. Exception by defendant.

A. I am afraid I cannot give you the names, sir. There is one young man, known to me as Charley and another one is Gus; I do not know their names; there are two. And then there are some young ladies, and also a forewoman, whose name I do not remember, a Miss Blondell.

Q. You mean all of them keep these books which are kept for the manufacturing department?

Same objection, ruling and exception by defendant.

57 A. They keep books in which we keep record of the costs of doing our work and the amount of work done on various orders.

Q. Is there not always an entry made whenever an order is delivered to the purchaser of how much has been delivered and charged?

Same objection, ruling and exception by defendant.

A. I do not know that, sir. I do not have anything to do with the sending out of bills or vouchers. The auditor has charge of the bills and vouchers in our company.

Q. How long has the auditor been in charge of the auditing department, and in charge of the books and vouchers?

A. The present auditor?

Q. Yes.

A. I do not know, sir.

Q. How long have you known him?

A. I beg pardon.

Q. How long have you known him?

A. Oh, I should say six or eight years.
Q. Wasn't he auditor during all those years?
A. No, sir.
Q. What was he previously?

Mr. JENNER: Now, may it please the Court, this seems to have degenerated into a mere inquiry as to whereabouts my friend can find the evidence which he thinks may support his allegations, and I do not think that is proper. I think that witness should be examined as to matters which are relevant to the issues which are made by the pleadings, and not to simply find out where he may possibly get the evidence, or to sending out a drag net and get them into Court at some future session or some adjourned day. That is the province of the subpœna.

Mr. KNAUTH: I will call upon counsel for defendant here to produce the letters and vouchers which relate to the transactions between the two companies, for which I served him a notice to produce and which he produced at the last trial.

58

Mr. JENNER: I do not produce them.

The COURT: When was it, you say, that this defendant printed and sold these lithographs in imitation; when is it you charge it to have been done?

Mr. KNAUTH: In the year 1902.

The COURT: 1902; you claim that then or thereabout; when was this suit brought—about when?

Mr. KNAUTH: June, 1902.

The COURT: June, 1902, you brought this suit, and of course you claim that they were made or exposed for sale by this defendant prior to that time; is that right?

By the COURT:

Q. Do you get up the designs there yourself, witness, or simply take orders?
A. We have artists there getting up business, and then afterwards furnish them to our customers. We do both.
Q. Who was your auditor in 1901 and 1902?
A. I do not know, sir.
Q. You do not know?
A. No, sir.
Q. Do you know whether or not, not for the pictures of your design, but for lithographic pictures where the designers themselves furnished the design he took, whether you received an order?
A. There are order books kept; that is, where we receive orders.
Q. There would be no distinction where the design was furnished by others and where you furnish your own?
A. Not where the order is entered.
Q. When you receive an order you enter that in your book, do you?
A. Yes, sir.

Mr. JENNER: Is that true of 1902?

Q. Was that true of 1901 and 1902?

A. We have always kept our books so far as I know. I do not know who kept those order books in 1901 and 1902.

Q. Do you know where the books of the company now
59 are, in whose custody?

A. The books of account; the charging books?

Q. Are these order books what you call books of account?

A. No, sir.

Q. Do you know anything about where the order books are?

This is all under your objection, Mr. Jenner. I want to save time if we can and get on.

Mr. JENNER: And also under my exception.

A. I know who has the current books that are in use to-day. I do not know who has those that were in use in 1901. I do not know whether those current books are the same that were in use then.

Q. Do you know who has the books of account now? I suppose when you sell goods you fill an order according to the order for anybody, that you charge that person or company, whichever it is, with the goods printed, don't you, or sold to them; if it was simply for printing, whatever you did for them, whatever you sold them you would charge in the book, wouldn't you?

A. Yes, sir; there are charge books. The auditor has got them.

Q. What do you keep, if you know? Do you keep a double entry or single entry system?

A. Double entry.

Q. So that you would have all the books that are usual to such a system *to* bookkeeping?

A. Yes, sir.

Q. Naturally would if you do business.

Mr. JENNER: Your Honor allows me an objection to each one of the questions that you put, which objections are overruled, and your Honor allows me an exception?

The COURT: Yes, to every question.

By Mr. KNAUTH:

Q. To whom did you report while you were purchasing agent?

60 By the COURT:

Q. He was purchasing agent. Now, what does that mean? What did he purchase—supplies for the business?

A. Yes.

Q. Inks and paper?

A. Inks and paper and coal and material and everything; coal, inks, and material of all kinds used in the business.

Q. Necessary for running a lithographic business, is that it?

A. Yes, sir.

Mr. KNAUTH: Who directed you to purchase this or that?

Mr. JENNER: I object to that as immaterial and irrelevant.

The COURT: Who gave him directions?

Mr. KNAUTH: Yes.

The COURT: Whether, he being purchasing agent, exercised his own discretion, or whether he took orders from somebody?

Mr. KNAUTH: Yes.

The COURT: How was it; all under your objection, Mr. Jenner, every question; the same objection and objection overruled and exception given.

A. Purchases of a certain kind had to be reported to the executive committee, and for certain purposes purchases could not be made over a certain amount without the authority of the executive committee.

By Mr. KNAUTH:

Q. Now tell us who were the executive committee in the year 1902?

A. I do not know, sir. It would appear from the minute book of our company. Minutes were kept of the meetings of the executive committee. These minutes are not in my possession.

Q. Well, you are the secretary of the company, are you not?

61 The COURT: He said that; he was.

Q. In whose possession are they?

Mr. JENNER: I object to that. I object to the question in whose possession they are.

The COURT: We have got that once already. He said they were in his possession—that is in his custody.

A. Allow me to explain. He is asking now about the minutes of the executive committee. I said the minutes of the Board of Directors.

The COURT: I understand this, that the proceedings of the executive committee were kept in the book of minutes, and that you, as secretary of the company, kept them.

The WITNESS: They have a separate book.

The COURT: Do you have anything to do with keeping that?

The WITNESS: Excepting I have acted as secretary *pro tem* sometimes when the secretary was away.

The COURT: You mean you do not have that book?

The WITNESS: No, sir.

Q. Who has it?

A. That book is in charge of the secretary of the committee. .

Q. And who is that?

A. Mr. Donaldson.

Q. What is his first name?

A. Robert M.

Q. Is Mr. Robert M. Donaldson also the vice president of the company?

A. Yes, sir.

Q. Since when has he had charge of the minutes kept by the executive committee?

A. I do not know, sir.

Q. Who are the present executive committee?

Mr. JENNER: I object to that as irrelevant.
The COURT: If he knows, he can tell.

Exception by defendant.

A. Joseph P. Knapp, Louis Ettlinger, Robert M. Donaldson, Frank S. Harris, G. H. Buck, and Charles Eddy. I was a
62 member of the executive committee; I think it was after 1900 some time; I can't remember in what year it was. How long I continued to be a member of the executive committee, I do not remember, sir. I should think a couple of years.

Q. Can't you tell us what years?
A. No, sir.
Q. Was it previous to 1904?
A. I really do not know.
Q. How long do you know that you have not been a member of the Executive Committee?
A. I could not tell you, sir. I am a member now and have been for the past two years.
Q. Have the members of that Executive Committee been the same during that time?
A. They are the same this year as they were last year, that is, they would date back to about February of last year; I am not sure about that.
Q. Now, when you previously reported to the Executive Committee, don't you remember to whom you reported?

Mr. JENNER: What had that got to do with the case. I object to that. Of course, we can easily take up the rest of the afternoon in inquiries of this nature, which are inquisitorial.
Mr. KNAUTH: You might shorten it by producing the papers.
Mr. JENNER: And it has no pertinence to the case. As I say, he is throwing out his line, and might get a bite or not. It throws no light on this issue.
The COURT: He has not got very much yet, I will admit that. I don't know what he will strike, I am sure.
Mr. JENNER: I seriously make the objection that it is an improper examination; that it is a waste of time of the Court and counsel and of the jury. That all these questions of this nature, which are in the nature of a fishing excursion, are irrelevant to any issue in the case, and ought to be excluded.
The COURT: He has subpœnaed the secretary of the company, who presumably would have the custody and charge of the
63 books of the company; the records at least. He says he don't and he gives the name of an auditor who had the books of account, and he don't know the name at the time in question; and he says they have a book in which they enter orders, but he does not know who has got that—go on.

Exception by defendant.

A. This is as purchasing agent making purchases?
Q. Yes.
A. I wrote a letter to Joseph P. Knapp, president.

Q. You mean that was your ordinary custom?
A. Yes, sir.
Q. Whenever you intended to make purchases or had made purchases?

Mr. JENNER: Is it material what purchases were made; what we are inquiring about here is the selling.
The COURT: It seems so, but I do not know.

A. I think the former answer gave an answer to that question. There were restrictions regarding purchases above a certain amount; for orders on hand purchases could be made, but they had to be reported to the executive committee. For additions to the plant above a small sum the consent of the executive committee had to be obtained to the purchase before it was made.
Q. Had the executive committee any control over what had to be sold by the company?

Mr. JENNER: I object to that on the grounds of the statute and the Constitution.
Objection overruled. Exception by defendant.

A. They had control over what was to be sold, sir.
Q. If a salesman took a large order, was it the custom to report it to the executive committee for approval?
64 Mr. JENNER: Same objection. What is a large order? I also object to it on the ground that it is indefinite. I do not know what a large order is.

Objection overruled, Exception by defendant.

A. No, sir.
Q. Do you mean to say that an ordinary salesman exercises such control over the business that he could determine whether the company would accept a large order and manufacture and deliver it; was that the business?
A. No, sir, the salesman had no such jurisdiction.
Q. Now, who had to determine?
A. You are speaking now of 1901 and 1902?
Q. Yes.

Mr. JENNER: I do not know that the witness is not competent to state. His competency is not shown. I object to it on that ground. What an ordinary salesman is I don't know.
Mr. KNAUTH: It is merely the custom of the business.
Mr. JENNER: It seems to be largely speculative.
The COURT: Let us see what the witness knows about it.

Exception by defendant.

A. No, I think, is the answer to that. I think I have already answered it.
Q. But we want more than that. We want to know how it was done?
A. That was another question that came afterwards.
Q. Please answer that now?

Mr. JENNER: What was done?

Mr. KNAUTH: The taking of an order by a salesman and the carrying out of an order by the salesman or the company.

Mr. JENNER: I object on the ground that it does not appear that the witness knows how it was done or that it was done at
65 all, as well as the special objections under the statutes referred to.

Objection overruled. Exception by defendant.

A. Now what was done?

Q. When a salesman took an order, how did he bring it about that the company would accept it and carry out the order?

A. I do not know.

Q. When you had charge of the manufacturing in that business how was it done under your superintendence?

Mr. JENNER: I object to that. It has no relation to the period as to which counsel stated he is particularly interested.

Objection overruled. Exception by defendant.

Mr. KNAUTH: I think the inquiry is always legitimate that whatever was done previously would be continued unless a change was shown.

The COURT: Find out, if you can.

Exception by defendant.

A. I don't know, sir. We are talking now of the time I had superintendence of the manufacturing department? That was in 1897. We received orders from the selling departments and they were taken charge of by several young men, and Mr. Schroeder, and Mr. Anderson, and Mr. Oelkers and Mr. Hoagland.

By the COURT:

Q. Go right on and tell how it was done. Shorten this up if you can.

A. These orders were received from the office where the orders were entered when they came in. Orders came up to the manufacturing department, and these young men supervised the execution of the orders.

66 Q. Did you have anything to do with making out that determination, whether these orders would be filled or not?

A. No, sir.

By Mr. KNAUTH:

Q. You are a director, are you not?

A. Yes, sir.

Mr. KNAUTH: I think it means for a motion outside of the trial of a case.

The COURT: Do you think it takes a month's notice?

Mr. KNAUTH: No, but before the trial for the purpose of discovery.

The COURT: If you don't want to avail yourself of it, I won't make

you, but I don't want to listen here for more than a week to a fishing excursion what the witness says he does not know anything about.

Mr. KNAUTH: The witness does not even produce the books here which he was supposed to bring.

The COURT: He says he has not got them. (To the witness,) You have the minute book.

The WITNESS: I have the minute book of the board of directors.

The COURT: You ought to have brought that.

By Mr. KNAUTH:

Q. Will you also produce the minute book of the executive committee?

Mr. JENNER: You won't make any bargain on behalf of the defendant. I am counsel on behalf of the defendant, and these books belong to the defendant, and I shall object to his making any bargain on behalf of the defendant.

Mr. KNAUTH: I make the motion now that the defendant be required to produce on Wednesday of this week, at the opening of this Court, the minute book and minute book of the executive committee, and its business books relating to any transactions as to the manufacture and sale of the posters or chromos called "Here's to Old English," and also all correspondence with the American Tobacco
67 Company relating thereto, and all receipts executed by that company for such posters, orders for delivery, and all memoranda relating to such manufacture and sale between July 1, 1901, and July 1, 1903. I make that motion.

Mr. JANNER: I object on one ground, at any rate, that due notice of that motion has not been given. If due notice of such a motion had been given I should have been better prepared to argue the motion and cite authorities. I suppose that section means something.

Mr. KNAUTH: I think I had a right to rely upon the obeyance to be had to the subpœna *duces tecum* in this action. We have subpœnaed also Mr. Ettlinger, the treasurer of the company.

The COURT: Have you got any other witnesses to go on?

Mr. KNAUTH: Yes; we can go on with other witnesses.

The COURT: The defendant company is here in court on the trial of the action, which trial it has had due notice and of the nature of the action and of the question involved, and not only that, but one of its executive committe has had a subpœna served upon him some days ago to produce the books and papers of the company relating to this transaction in issue, and so the Court holds that notice of 24 hours is due and ample notice, and the Court now orders that the defendant, the American Lithographic Company, produce in this Court, at this place, on Wednesday next, at 11 o'clock A. M., the book of minutes of the Board of Directors, the book of minutes of the Executive Committee, the books of that company and the books in its possession showing all orders received by it or any of its predecessors, orders received for lithographic work of any and all descriptions, and sales made by it, and entries of orders filled, the nature and character of such work, the charges made for such work,

and the payments received for such work clear back to the
68 year 1901, and all correspondence and letters received, letters sent, copies of same, especially relating to such work between it and the American Tobacco Company, and especially with reference to anything that has any bearing on or relationship to this picture, Exhibit G, for identification.

Mr. JENNER: I was desiring to interrupt your Honor, but you did not afford me an opportunity of calling to your attention the latter words of the first sentence of Section 734.

The COURT: I have had my attention called to that for years.

Mr. JENNER (Continuing): And circumstances where they might be compelled to produce the same under ordinary rules of procedure in chancery. I am prepared to submit to your Honor that in such an action as this in chancery, no production of books would be authorized. I can do it in the course of five minutes.

The COURT: The powers of the Court are ample to compel a party to a litigation having possession of such books and papers and letters to produce them in court, and this Court has had occasion several times to exercise the power and it is ready and willing and perfectly able now to enforce its order in this respect, and gives notice that it will do it, because courts cannot sit here with juries and conduce in any way or assent in any way to the enactment of a farce. This company knows perfectly well what is wanted of it, and this company knows perfectly well, if it has had anything to do with this transaction, it has the books and papers and letters contracts and correspondence, and if it has not had anything to do with it, it don't have any such books, papers or correspondence, and won't produce them, and will say so; if it has it is its duty to do so, and this act says on due notice. Now, if this company was off far somewhere and came here, why, due notice would mean some days and an opportunity to
go and look it up, but they are right here and one of its execu-
69 tive committee and its secretary has had the subpœna, and this company has known for days what was required and what was wanted. The only question is the propriety in a case of requiring a company through the officers to furnish evidence against themselves and the Court will not argue because it has no right to argue or question the propriety and wisdom of the decision of the Supreme Court of the United States, which is that in all of these cases, and even in criminal cases, that the company, the officers of the company, may be compelled not only to give evidence but to produce books and papers, and it cannot be used to punish the officers or the directors. This Court is bound to follow these decisions. We cannot sit here and quibble over it to the jury, quibble over it, quibble over it a great while. There has been a great diversity of opinion among lawyers as to the wisdom of that decision. I- cannot be questioned by any court. It is the decision of the Supreme Court of the United States. It is the duty of everybody to obey the law and live up to it. I cannot direct this witness to bring books and papers that he don't have in his custody or under his control. The company can be directed to produce them.

Mr. JENNER: I have been unfortunate in making my own position

and that of the defendant somewhat obscure. My intention is and has been not to ask your Honor to depart from any rulings of the Supreme Court or of the Circuit Court of Appeals. I have endeavored to insist upon the defendant's rights, wherever the defendant seems to me to have any. I have been and am of the opinion that the subpœna which has been served was nugatory. I have been and am of the opinion that Section 724 applies to the defendant, and that the defendant is protected by it as a shield. If equity would protect the defendant from a disclosure—and on that I am prepared to refer your Honor to authorities which would be ample, beyond that to which I have already referred; but your Honor don't seem to have understood entirely the position I take.

70 The COURT: What do you mean, a court of equity would have no right to say that the defendant here need not produce these books?

Mr. JENNER: A court of equity has no right to say a defendant shall produce a scrap of paper as large as a copper cent for the purpose of convicting a defendant, and I can produce amply authority on such a case. If in the prosecution of such a case, Shylock-like, they seek to extract $10 for every sheet of those things, without having sustained 10 cents' worth of damages, without the defendant having made five cents of profit, the plaintiff must prove its case without attempting to feather its arrows from our own breast. There has been equity for 200 years. It has been the law of this country for more than a century. It has never been departed from, and it appeals to the sentiments and to the emotions of every American who has been educated under the common law and under the equity law and chancery law of England. I shall take great pleasure in referring your Honor to numerous authorities, it will take me but a few moments. In this district——

The COURT: If you have any authorities?

Mr. JENNER: This motion is made without notice, and I only ask for a few moments for the purpose of finding them among my papers.

The COURT: It says due notice.

Mr. JENNER: Due notice is not instantaneous notice.

The COURT: It depends altogether upon circumstances what due notice is. Due notice to a man to get out of the way of a steam engine if he was a few rods in front of an engine, the engineer should say, "I am coming and cannot stop," he would have due notice.

Mr. JENNER: I am inclined to think even in that case it might not be due notice and if he was injured he might recover anywhere from $10,000 to $50,000 damages.

71 The COURT: I do not think there is a jury on the face of the earth that would say if he heard it and was in possession of his faculties he would have any right to stand there and be run down.

Mr. JENNER: I have the authorities here. One was the opinion of Judge Brown in Newgold *vs.* American Electric Novelty Co., 108 Fed. Rep., 341.

"In a *qui-tam* action under Rev. St., Sec. 4901, to recover the penalties thereby imposed for falsely marking an article as patented,

the defendant cannot be compelled under Section 724 to produce books or papers containing evidence against himself, either for use in evidence or for the inspection of the plaintiff before the trial. Such an action is penal in character."

The COURT: I am perfectly familiar with that; I have been reading that a long time ago; right after this case opened. I have it right here in front of me and am familiar with it.

Mr. JENNER: Then I will refer your Honor to Judge Wallace's——

The COURT: Most people believe that that is the law. It has been decided by the Supreme Court of the United States.

Mr. JENNER: I do not quite understand to what your Honor is referring.

The COURT: You are referring there to the decisions that a defendant cannot be compelled in an action for a penalty to produce evidence, books and papers against himself.

Mr. JENNER: Yes, sir; that is my proposition.

The COURT: I tell you this Court is perfectly familiar with it.

Mr. JENNER: Does your Honor deny the rule?

The COURT: Here is this statute that says the defendant may be compelled.

Mr. JENNER: Except in cases where equity would protect,
72 and if I can show to your Honor that in *an* equity production of books and papers would not be required, then Section 724 does not authorize production in actions at law. Now, I refer your Honor to an equity case in 18 Blatchford, 287. In 63 Fed. Rep., 623; Snow *vs.* Mast.

Another decision of Judge Shipman, Circuit Judge in this Circuit; In Daly *vs.* Brady, 69 Fed. Rep., 285.

In Atwell *vs.* Feris, 2 Blatch.

The COURT: Of course, if I have not got any authority to do it you won't obey the orders of the Court?

Mr. JENNER: Your Honor understands I always want to exhibit respect for the Court.

The COURT: It is not a question of respect for the Court.

Mr. JENNER: It is no light matter to disregard an order of the Court, but the Court ought not make orders which ought not to be obeyed.

The COURT: The Court ought to make orders which it believes are just and proper in any case, and which the law requires it to make, and if the party does not see fit to obey the order, why, they have a remedy, which is to disregard it and take the consequences. It can be appealed if the decision of the Court is not right; and there is an appellate court—two of them—to which it can resort.

Mr. JENNER: Your Honor will bear in mind this order was made without giving me that notice that the defendant was entitled to for the purpose of discussing it. I should have been glad to have discussed it more at length than I did. I feel satisfied that I should have carried your Honor with me.

The COURT: It is not a question of the length of the argument.

Mr. JENNER: It is a question of its force.

The COURT: The Plaintiff here in this action either has a right or else it don't have a right to the production here of this evidence. Here are books and papers bearing on this question and
73 directly in relation to it. They are in the possession, if there are such, if they have such records, any correspondence, they are in the possession of this defendant, and in the very nature of things the plaintiff cannot produce them. It is a dealing and a transaction of and in violation of the laws of the United States, and the law gives to the plaintiff here and to the United States joint interest in the recovery. The law is made, like the patent law, for the protection of works of art; it is to encourage works of art; it is to encourage literature. We have copyrights on books and on pictures, and we have built up in this country under these laws and have encouraged the artists, and the law is, I say, good for something or it is not good for anything; and now the question is, the simple question is in an action for these penalties for the joint benefit of the plaintiff, the party injured, and the United States, can the alleged infringer who is alleged to have incurred these penalties, be compelled to produce books or papers or documents which show or do not show a violation of the statute? That is all there is of it; there is not anything more to it.

Mr. JENNER: I think a great deal more.

The COURT: In its full length and in its full breadth. There is no question of due notice. What is due notice depends altogether upon time, place and circumstances. The plaintiff here has subpœnaed the secretary of the company. Ordinarily they are supposed to have the custody of the books and papers so that they can produce them. The secretary says he don't have them, has nothing but the records and meetings of the Board of Directors. All the other books and papers, he says, are not under his control, and he don't have the slightest idea who these men are. He is secretary of the company and he does not seem to know who anybody is, nor where they are, nor who has got the books, nor who has got the papers, nor where they keep them; and, of course, we are bound to accept his
74 testimony; he is called here by the plaintiff. Now he can produce the book that he does have custody of; that is all he has control of. That is all the power of the Court can do in that regard. I do not think the statute is a farce and that this holding of the Supreme Court the exemption runs to the officers of the company and not to the company itself. I do not think that there is any doubt of the power of the Court. The question has been up here in these same cases in the Circuit Court of Appeals, and they say this case disposes of it. I have examined it carefully heretofore, and I have examined it again carefully to day after your argument to see if I could hold any differently. There is the Supreme Court of the United States and the Circuit Court of Appeals here, and I do not think I will hold contrary to those two superior courts.

Mr. KNAUTH: If it please your Honor, in order to avoid any misunderstanding of the order which the Court has just made, I would suggest that the papers which the defendant is required to produce and books which it is required to produce be further speci-

fied as those relating to transactions between July 1, 1901, and July 1, 1903, so as not to call upon them for unnecessary material after that later date.

Mr. JENNER: I continue my objection to the amendment of the order, putting the objection on the grounds heretofore made.

The COURT: Yes, limit it to the time covered by this transaction.

The COURT: Stand aside witness. Be here next Wednesday with the books of minutes which you have charge of, and if there is not anything there that anybody wants that will end that.

The witness leaves the stand.

75 JAMES FLETCHER, Jr., called as a witness for the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. KNAUTH:

Q. What is your business, Mr. Fletcher?

A. Comptroller of the American Tobacco Company since about July, 1894. My principal duties are in reference to the accounts.

By the COURT:

Q. What do you mean—you are comptroller of what company?

A. The American Tobacco Company.

Q. What are your duties?

A. My duties are official in a measure. I have no active part in the running of the account. I simply overlook the policy and method of accounts in a general way, but I have other duties which are independent of the accounts.

Q. Are the books kept under your direction?

A. Well, I am responsible.

Q. Under your general direction?

A. Yes, sir.

Q. That is, the books of account, I mean?

A. Yes, sir.

Q. Were you comptroller in 1901 and 1902?

A. No, sir.

Q. Who was?

A. There was no comptroller at that time.

Q. Who had charge of the account then?

A. I had.

Q. You did have, then?

A. Yes, sir.

Q. What was your office then?

A. Auditor.

Q. At the time?

A. Yes, sir.

Q. In 1901 anad 1902 you were auditor and had charge of the books?

A. Yes, sir.

Q. Did you have occasion to know in a general way who made out accounts?

A. Yes, sir.

Q. Do you mean to swear here, now, that you had no account whatever with the American Lithographic Company?

76 A. Our method of keeping books, the American Lithographic Company's name did not appear on our books except as we paid $10,000 to the American Lithographic Company. They had no account on our books headed "American Lithographic Company." We had business with the American Lithographic Company. It did not appear in the ledger account. We paid checks to the American Lithographic Company; drew checks to their order. We had no books in which we entered bills in my department.

Q. Did you in any department?

A. That I do not know.

Q. That you do not know?

A. No, sir.

Q. Did you have stubs for your check books.

A. Yes, sir. We paid the American Tobacco Company.

Q. Were the checks returned?

A. Yes, sir.

Q. So you have got the stub books and checks?

A. Not at the present time.

Q. In the year 1902 have you any recollection of having seen a picture like the picture "G" for identification, which I now show you?

A. Yes, sir; in the office of the American Tobacco Company. I think one was brought in when the Sheriff came to seize them. I do not know how many we had; I cannot recall more than two or three. I think they were brought in when they came to seize them. That, I think, was in 1901. I do not remember any payments relating to pictures of this kind, nor whether there was any payment made for pictures of this kind.

Q. Have you been subpœnaed here?

A. Yes, sir.

Q. With a subpœna *duces tecum?*

A. I have the subpœna in my pocket.

Q. Did you bring with you any of the books and papers specified in this subpœna?

A. I could find nothing on the subject.

By the COURT:

Q. Did you look?

A. Yes, sir; made inquiry.

Q. Made thorough search?

A. Yes, sir.

77 Q. Among all your books and papers?

A. They are not there, sir. I might as well explain to you, the books are not in existence.

Q. Did you look among everything that you have got?

A. Yes, sir.

Q. That is in existence?

A. Yes, sir.

Q. Made thorough search?
A. Yes, sir.
Q. And you found nothing whatever that bears on the subject?
A. Not a thing.
Q. Mentioned in that subpœna, is that it?
A. Not a thing in the world, sir.

To the COURT:

The only books that would give the record that you want are in the nature of memorandum books, which have been destroyed, the whole thing; they were unimportant. I do not know who destroyed them. I was told it was destroyed.

Q. The checks and stubs?

A. The checks and stubs would not show anything; they have been destroyed also.

Q. All the checks that were given by your company to the American Lithographic Company have been destroyed?
A. Yes, sir.
Q. And all stub books have been destroyed?
A. Yes, sir.
Q. When was that done?
A. Well, I cannot state specifically about that batch of books.
Q. About when?
A. Shortly over a year ago; about a year ago.
Q. About a year ago?
A. Yes, sir.
Q. After this action was brought?
Mr. JENNER: It is about two years ago, isn't it?
The WITNESS: I do not really know; I did not have to do with the destruction of them. I do not know. Some of these papers, the books that would give you any detail were not kept in my department at all.
Q. But the question is when they were destroyed?
A. That I do not know.
78 Q. You do not know?
A. I do not know; the stubs and things of that sort were destroyed some time ago, but when I do not know, as I did not have to do with it.
Q. Who by?
A. The auditor.
Q. Who is that?
A. Mr. Schroeder.
Q. What is his first name?
A. W. H.

By Mr. KNAUTH:

Q. Don't you remember that at the time of the call of the Marshal there were quite a large number of such pictures in your office?

A. I have no such knowledge; no, sir. My office was very small and they could not have got them in.

Q. Since when have you been comptroller?

The COURT: Of course, Mr. Jenner, all these questions I ask I will give you an objection and an exception.

A. I was made comptroller, I think it was the first of July, 1894.
Q. And previous to that time you were auditor?
A. Yes, sir.
Q. Of the American Tobacco Company?
A. Yes, sir.
Q. Now what were your functions as auditor of that company?
A. I had charge of the books and accounts.
Q. Were the books and accounts that you have testified to destroyed while you were auditor of the company?
A. No, sir; oh, some of the minor books may have been, that I do not know.
Q. Did you destroy any yourself?
A. No, sir.
Q. You never did?
A. No, sir, we destroy matters that are immaterial, if we did not, we would have such a volume of papers that we could not keep them, too much of them, to- many of them.
Q. Didn't you testify at the previous trial of this case that in the year 1902 you paid checks almost daily to the American Lithographic Company?
A. Yes, sir.
79 Q. And that was the fact, was it not?
A. Yes, sir.
Q. Can you tell us the amounts that you paid in total to the American Lithographic Company during the year 1902?
A. Yes, sir.
Q. When you paid your checks almost every day, what record did you keep of those checks?
A. If we had twenty bills for the American Lithographic Company they were all entered as one item. The checks drawn, $10,600 if it amounted to that, and in the cash book we entered "American Litho" and no details put in the books.
Q. There must be a cash book which shows these items?
A. Yes, sir.
Q. And there would also be the stubs of the checks showing the payment?
A. No, sir.
Q. You say they have been destroyed?
A. The stubs would simply give voucher numbers and would not do any more.
Q. That might be very important, might it not?
A. Not unless you could find the voucher.
Q. Did you number the vouchers in your office?
A. Yes, sir.
Q. Every one?
A. Yes, sir.

Q. Didn't you get vouchers from the American Lithographic Company for every bill which you paid?

A. Yes, sir.

Q. So the receipted bill for every transaction should be in the company's possession?

A. It is not.

Q. I mean it should be, in ordinary usage?

A. Yes, sir; if kept.

Q. You say the bills are not in your possession or in the company's possession?

A. No, sir.

Q. What do you know about the destruction of these vouchers of the American Lithographic Company?

A. I do not know anything.

Q. How do you know they are destroyed?

A. Because I asked to find out.

Q. Whom did you ask?

A. The auditor.

80 Q. Whom you have just mentioned?

A. Yes, sir.

Q. Don't you recollect that at the trial of this case last time before Judge Townsend in this court these very vouchers were produced by counsel for the defendant and shown to Judge Townsend and submitted to him?

A. Not in my presence or with my knowledge.

Q. Don't you recollect that these vouchers had been given by your company to the counsel for the American Lithographic Company?

A. I did not know it; no, sir.

Q. You do not know anything of it?

A. No, sir.

Q. Did you ever know anything about these vouchers of the American Lithographic Company?

Mr. JENNER: I deny that these vouchers were shown to Judge Townsend.

The COURT: That don't prove it. He asks him and he says he does not know it. That does not prove anything.

Q. Who was the person who would receive posters of the lithograph like Exhibit G in your company's office?

A. I do not know, sir.

Mr. JENNER: I object to it, on the ground that it is immaterial and irrelevant to any issue in this case. I further object to it, on the ground that there is an action pending against the American Tobacco Company for penalties arising out of the same copyright and that the Tobacco Company is privileged from giving any evidence tending to lead up to charging it with a penalty.

Objection overruled. Exception by defendant.

The COURT: I do not rule that it is absolutely material here, but it may be, it may lead to the discovery. Of course, these witnesses that they are now calling are unfriendly to the plaintiff; that is,

they are protecting themselves, as they have a right to do
81 in all legal ways, and it is nothing against their veracity, but the plaintiff is compelled to call on them, and therefore the Court rules that the plaintiff's counsel may conduct an examination which is really in the nature of a cross examination arising out of the exigencies of the case; they may cross-examine him, and that is the justification from the departure from the ordinary rule. In all cases where a party is compelled to call a witness who is antagonistic in the nature of things, the rule of examination is different, and they may conduct an examination in the nature of a cross-examination and ask leading and suggestive questions. So, here, while many of these questions apparently are immaterial, the Court allows them because of the fact that it may lead to the discovery of what they want.

Mr. JENNER: I except to your Honor's ruling, and each and every part thereof.

Q. Do you know whether all the bills rendered by the American Lithographic Company to the American Tobacco Company in the year 1902 have been paid?

A. I do not know, sir.

Q. You do not know?

A. No, sir.

Q. Was there any statements made at the end of each year?

A. Bills were paid in the regular course of business.

Q. You mean they were paid as they were rendered within the usual reasonable time intervening?

A. As far as I know; they were not delayed if I got them.

Q. What was the usual time of payment between those companies, was it sixty days' credit?

A. I do not know.

Q. Don't you know what their mode of dealing was with one another?

A. I do not know.

Q. Was there a cash account between them?

A. When a bill came through and it was correct, it was paid.

82 By the COURT:

Q. Did you see these bills?

A. The specific bills?

Q. You have testified here that checks were drawn by your company in payment of bills that came from the Lithographic Company?

A. Yes, sir; I saw every bill I paid by check.

By Mr. KNAUTH:

Q. Did the American Tobacco Company do any printing of their own in the way of lithographing?

A. I do not know.

Q. Did you ever see any lithographing done by the American Tobacco Company?
A. Yes.
Q. Where?
A. They are doing it now in our general department.
Q. Since when?
A. I do not know when it commenced.
Q. When did you first know it?
A. Two or three years ago.
Q. When?
A. Two or three years ago.
Q. Does the American Tobacco Company have any lithographic establishment capable of turning out such posters as Exhibit G?
A. Not to my knowledge.
Q. Never had?
A. I do not know.
Q. Who wrote out the checks to the American Lithographic Company in 1902?
A. I do not know.
Q. Were they written out by different people?
A. Yes, sir.
Q. Who had authority to write out checks?
A. Anybody that might be designated by the cashier.
Q. Who was the cashier?
A. G. C. Durham.
Q. During the entire year 1902?
A. Yes.

By the COURT:

Q. Who signed them?
A. I signed one end and the other was signed by the treasurer.

83 By Mr. KNAUTH:

Q. By whom?
A. The treasurer.
Q. Was the treasurer the same person whom you have called the cashier just now?
A. No, sir.
Q. Who was the treasurer?
A. H. D. Lee, I think, at that time, I am not positive.
Q. What was the office of Mr. Hicks in 1902?
A. I think he was assistant treasurer.
Q. What was the office of Mr. Francis A. Wilson?
A. I do not know, he was in one of the selling departments.
Q. Don't you remember a department called the "curve cut department?"
A. I do not think that was the name of it.
Q. What was its name?
A. I really do not know; I do not recall its official name.
Q. Mr. Wilson was in charge of a special department, was he not?

A. Yes, sir.
Q. And wasn't it in that department that those pictures like Exhibit G were used?
A. I do not know.
Q. When did you last see the vouchers or receipted bills of the American Tobacco Company rendered to your company for the business for 1902?
A. 1902, I guess.
Q. 1902?
A. Yes, sir.
Q. What was your custom with reference to keeping vouchers?
A. We kept all papers until it served their purposes, and then we destroyed them.
Q. Then you have destroyed papers?
A. Papers, unimportant papers, yes, we destroyed continually.
Q. Do you call vouchers unimportant papers?
A. No.
Q. Those you call important papers, do you not?
A. Yes, sir.
Q. Do you not keep vouchers systematically?
A. For a certain length of time.
Q. How many years do you keep them?
A. That I do not know.
84 Q. Where do you keep them?
A. I do not know where they file them now.
Q. They were filed, were they not?
A. Yes, sir.
Q. And put away on file?
A. Yes, sir.
Q. Had you anything to do with the destruction of vouchers at any time?
A. No, sir.
Q. Never.
A. No, sir.
Q. You have never received any instructions to destroy any vouchers?
A. No, sir.
Q. Do you know whether you obtained a voucher for every shipment of lithographic matter that you got?
A. We did not pay for anything for which we did not have an approved bill.
Q. You have always insisted on having a voucher that was the custom, was it?
A. Always had a voucher, yes, sir.

FRANCIS A. WILSON, called as a witness for the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. KNAUTH:

Plaintiff offers in evidence a stipulation.
(Stipulation handed to Court.)

Mr. JENNER: There seems to be a reservation in the last four lines of the stipulation.

The COURT: Let me read it. Are you going to object to it?

Mr. JENNER: Certainly I am going to object to it.

The COURT: Let me read it, then, so I may rule on it intelligently. Is Exhibit 5 the same as Exhibit G here?

Mr. KNAUTH: Yes, sir, the same picture.

The COURT: Now they offer to read that in evidence.

Mr. JENNER: And the defendant objects to it on the ground that it is incompetent, irrelevant and immaterial to any fact which is at issue in this case, incompetent against the defendant who is not a party to the transaction referred to therein.

The COURT: Standing alone independent, that is the truth.
85 It will depend on conditions when the evidence is in. I overrule the objection and give you an exception.

Exception by defendant.

Mr. JENNER: I only wish to submit, irrespective of that, even if there should be some connection made, the particular fact or facts which are recited in that stipulation are things that cannot be imputed to the defendant in any manner no matter what is assumed, that the defendant here, the Lithographic Company, made or sold or did with these pictures, what the Tobacco Company may have done with them has not anything to do with the case in which by virtue of its own act *of* Lithographic Company may find itself in. I object to the stipulation and each and every part thereof.

The COURT: The Court has overruled the objection and plaintiff may read it.

Exception by defendant.

Marked Plaintiff's Exhibit H, and the following is a copy thereof:

"It is hereby stipulated by and between the attorneys for the respective parties to the above-entitled action, that Charles F. Sturm, if called as a witness at the trial of this action, would testify that he is now and was on July 29, 1902, the Deputy United States Marshal at Buffalo, N. Y.; that on said 29th day of July, 1902, he served a copy of the Writ of Replevin entitled in this action and dated July 23, 1902, together with a copy of the papers thereto attached, to wit: the affidavit of Ludwig H. Schutze and Exhibit 'A,' being a copy of a picture entitled 'Chorus,' *of* which papers were filed in the office of the Clerk of this Court on August 5, 1902, upon Lorenz A. Deuther, Superintendent of the Deuther Manufacturing Co. at Buffalo, N. Y., together with a copy of the bond given in this action, and filed in the office of the Clerk of this Court on July 22, 1902, and then and there replevied at the place of business of the Deuther Manufacturing Co., at Buffalo, N. Y., nine hundred and
86 ninety-three (993) chrom'-lithographs like Exhibit '5' offered in evidence by the plaintiff during the taking of certain testimony of Ludwig H. Schutze on July 8, 1903, said Exhibit being hereto attached.

"It is further stipulated that Lorenz A. Deuther, if called as a witness at the trial of this action, would testify that on July 29, 1902, he was the Superintendent of the Deuther Manufacturing Co.,

at Buffalo, N. Y., and shortly previous to said dates the defendant herein sent to the Deuther Manufacturing Co. a number of chrom'-lithograph pictures identical with the picture hereto annexed and marked 'Defendant's Exhibit 5,' and directed the said Deuther Manufacturing Co. to frame such of them as defendant might from time to time direct it to frame and deliver; that on July 29, 1902, there were nine hundred and ninety-three (993) copies of the said defendant's picture (Old English Curve), still at the factory of the Deuther Manufacturing Co. in Buffalo, N. Y., and that said nine hundred and ninety-three (993) copies were held by said Deuther Manufacturing Co. as framers of such pictures only in pursuance to said directions and subject to the directions and control of the American Tobacco Company, and that said Deuther Manufacturing Co. neither had nor has any interest in said prints or pictures whatsoever; and that said nine hundred and ninety-three (993) copies were on said 29th day of July, 1902, replevied by the United States Marshal at Buffalo.

"This stipulation is made subject to such objections and exceptions to the competency, materiality and relevancy thereof, or any part thereof, as may be made by either party at the trial.

Dated New York, November 11, 1904.

BRIESEN & KNAUTH,
Attorneys for Plaintiff.
WETMORE & JENNER,
Attorneys for Defendant."

Adjourned to Wednesday, November 7, 1906, at 11 a. m.

87 NOVEMBER 7, 1906.

MR. JENNER: May it please your Honor, since the adjournment Monday evening I have received a copy, in part, of the minutes of Monday's proceedings, and I desire respectfully to except to this remark of your Honor's on Monday, which I will read from the minutes:

"This company"—referring to the defendant—"knows perfectly well what is wanted of it, and this company knows perfectly well if it has had anything to do with this transaction it has the books and papers and letters, contracts and correspondence, and if it has not had anything to do with it it don't have any such books, papers or correspondence, and won't produce them, and I will say so; if it has it is its duty to do so, and this act says on due notice."

I desire to except to that remark of your Honor's as of a nature to prejudice the jury against the defendant, by the implication that if the defendant does not produce books it is tantamount to admitting that it has incriminating evidence.

THE COURT: I will qualify that. We were talking of questions of law, and not for the jury. If you do not want to argue these questions of law before the jury you must not say anything about it, but if you argue questions of law before the jury you must take the consequences; but you will pay no attention to that gentlemen; you are sworn here as jurors to try this case and determine the case on

the evidence, not on remarks that counsel make as to the law nor on remarks that the Court makes as to the law, until it gets to the point where the Court in its final charge tells you what the law is as to affecting your consideration of the evidence, and these arguments
88 of legal questions here you have nothing to do with, drop them all from your minds, pay no attention to them. Sometimes it is deemed proper to send the jury out so they won't hear it, and if the counsel on the other side when they argue these legal questions, want that done the Court will do it; but I say to you, gentlemen, not to be affected, pay no attention, say nothing about it; it does not affect you in any way, shape or manner, and of course I qualify what I said there, if I said they know what letters there are or if there are any papers. Of course if there were no papers or documents and no entries in any books which they have relating to any such transaction, then of course they don't have them, and after looking it up they can say so. I am not saying that for the jury; I am saying it to counsel.

Mr. JENNER: I will take an exception.

The COURT: You may take an exception, certainly. The question was up here Monday; I want to see that subpœna *duces tecum.*

Mr. JENNER: Mr. Eddy is present under your Honor's order. Your Honor directed Mr. Eddy to produce the minute books of the corporation, the same being, as your Honor found, in his custody, and Mr. Eddy is here. Your Honor told him to appear this morning.

The COURT: This subpœna directs him to produce all the business books of such defendant, containing entries relating to the manufacture and sale by them of certain posters or chromos called "Here's to Old English." Also all correspondence with the American Tobacco Company relating thereto, and all receipts executed by that company for such posters, orders for delivery and all memoranda relating to such manufacture and sale between July 1, 1901, and July 1, 1903. Let the witness take the stand.

89 CHARLES EDDY, resumed the stand:

The COURT: The Court is ready to hold under that subpœna it was the duty of this witness, whether as secretary of this company, as an officer of this company, and as a member of its executive committee, whether he has the immediate custody of them or not, to produce every book and paper of the description called for relating to these chromos, these pictures, and you can examine him about it again.

Mr. JENNER: If your Honor please, the examination of Mr. Eddy was finished on Monday.

The COURT: They can open it.

Mr. JENNER: Excepting that your Honor directed Mr. Eddy to bring with him the book of minutes of the corporation which your Honor said was in his custody as secretary of the corporation.

The COURT: Yes.

Mr. JENNER: Containing the minutes of the Board of Directors

between the dates July 1, 1901, and July 1, 1903. That is the only order which your Honor made with respect to Mr. Eddy.

The COURT: I just gave notice that I was going to make another order.

Mr. JENNER: Your Honor made another order directing the defendant to produce books and papers, &c.

The COURT: I just gave you notice I was going to make another order as to this witness. I will give you an exception, but I am ready now to make the order that you may examine him, and then I will give the witness time to comply with it, so that you will have the whole question and the whole matter——

Mr. JENNER: I object to your Honor making any such order, on the ground that your Honor is without authority in the premises; that no notice of any such motion has been made; that as matter of fact no motion has been made; that the order is of your Honor's voluntary will, without being inspired by the plaintiff, and that the order is untenable.

90 The COURT: There is no inspiration by the plaintiff——

Mr. JENNER: Your Honor——

The COURT: Wait a moment. I want you to understand, Mr. Jenner, you must not make intimations of that character in this court.

Mr. JENNER: If your Honor understands what I meant——

The COURT: I think I do. There is no inspiration on the part of the plaintiff. This witness has been served with a subpœna *duces tecum* to produce certain books and papers. Now, this witness disclaimed the custody of any such papers, and I then declined to make any order requiring him to produce books or papers not in his custody as secretary of the company or under his control. I was requested to do it. I then doubted my right and authority to make that order, and so declined, but the witness was here and is here under that subpœna requiring him to produce those books and those papers, and so I have given due notice this morning that, having considered the matter and having examined the law and the authorities, I am now ready to hold and do hold that under that subpœna it is the duty of the witness to produce those books and those papers, and so the Court will make an order.

Mr. KNAUTH: I will ask your Honor to make that order now.

The COURT: If his examination makes it necessary the Court will make it and will make it under the law and not because the Court is inspired by the plaintiff.

Mr. JENNER: Your Honor misunderstood me, and if any such inference can be drawn from the language which I used, I do desire respectfully to withdraw it.

The COURT: Then do withdraw it.

Mr. JENNER: I do withdraw it. What I meant, sir, is that this Court cannot act *ex suo sponte* but upon the motion of one of its attorneys; that the plaintiff had made no such motion.

91 The COURT: The plaintiff's attorney made the motion here on Monday in open court and the Court then declined to grant that motion. The Court has reconsidered that matter and is

satisfied that it was in error in thinking that it did not have the power, and so I gave you notice. If the case had been closed and disposed it would be a different matter, but the case is still on trial and the witness is still here under the subpœna and subject to the jurisdiction of the Court.

Mr. JENNER: Then I will take my objection to the subpœna which your Honor did not give me an opportunity of taking on Monday, because I understood your Honor to say that the regularity of the subpœna was not in question. I now say that the subpœna in its service did not conform to the sections of the code of procedure of the State of New York in respect of the person served, in respect of the description of the books and papers, and in respect of the time elapsing between the service and the return day of the subpœna; and also I object to it on the ground that the defendant cannot be compelled to produce books and papers in that manner in an action of this character. I will now state to your Honor that acting upon the orders which your Honor made on Monday evening, the defendant has now come here prepared to respond to those orders and has not come prepared to respond to anything else.

The COURT: Has come in response to the orders already made. That may do away with the necessity of any further orders.

Mr. JENNER: It was in that line that I have informed your Honor that Mr. Eddy is here in obedience to your Honor's order to attend this morning.

The COURT: He was directed to attend here this morning and produce all the records that he has as Secretary of the Company.

Mr. JENNER: The order was explicit, as I recall it and as the minutes show, to produce the minute book which he had as
92 secretary of the corporation containing entries between July 1, 1901, and July 3, 1903.

The COURT: Am I mistaken in understanding him to say that that was the only record that he had custody of?

Mr. JENNER: Your Honor is not mistaken; you are right.

The COURT: Am I mistaken in his saying that he did not have custody or possession of any other papers or books of this company?

Mr. JENNER: Your Honor is correct in your recollection.

The COURT: Very good. Then he is here with the only books or papers that he keeps or has the custody of.

Mr. JENNER: That fact has not yet appeared, and I have not so stated. That fact can appear only by question and answer. I simply desire to be regular in the matter.

The COURT: On Monday I understood this witness to say that he did not have the custody or control of any of the papers of this company or of any record of this company, the record book, in which these transactions appear, excepting this record of proceedings of the Board of Directors.

Mr. JENNER: I so understood the witness; I think your Honor recollects the matter correctly.

The COURT: I undertook to recite that and I understood you to say that that was not the fact.

Mr. JENNER: No, sir; I have not challenged that statement at all;

I admitted that that was your Honor's order. If my language was obscure and led to a different impression I desire to correct it. I now state that the witness is here pursuant to your Honor's direction. Whether he has the book which your Honor told him to bring or not, I submit, can appear, not upon my statement, but only by a question now put by counsel or by your Honor and then his answer thereto. I desire to be regular about this matter.

Mr. KNAUTH: I will examine the witness.

93 Examination of Mr. EDDY resumed.

By Mr. KNAUTH:

I have brought with me and have here this morning the minute book containing the minutes of the Board of Directors of the American Lithographic Company.

Q. Please produce it.

Defendant objects to the production of the book on the ground that the book being a book of the defendant corporation and this being an action for the recovery of penalties under Section 4965, that the defendant is privileged from having the book produced. The book itself, I now understand, the witness has in his possession.

The COURT: The Court overrules the objection and gives you an exception and directs the witness to produce the book.

Defendant excepts.

Q. Please open the book which you have produced?

Mr. JENNER: I make the same objection to that.

The COURT: Oh, yes. Everything in the nature of and all the evidence given by this witness, and all that occurs now in regard to this book, in order to save time, is under the same objection and under the protest of the defendant and under the protest of the witness.

Q. (Repeated.) Please open the book which you have produced?

Same objection, ruling and exception.

Witness opens book.

WITNESS: There are two books.

Q. Please take up the first of them and state to us what the dates are between which the entries are comprised in that book?

Same objection, ruling and exception

94 A. The first entry is on the 30th day of December, 1895.

The COURT: Now, Stenographer, you understand and so enter it on your minutes, that if you have occasion to write out these minutes that you will enter the same objection after each and every question asked, and that the Court overruled the objection, and that an exception is given to the defendant.

Q. What is the last date of an entry in that book?

Same objection, ruling and exception by defendant.

The COURT: Of course if there is anything leading to object to, any leading questions, you can say it is leading so I can rule on that.

Mr. KNAUTH: With reference to that point, I desire to be put on record, inasmuch as the witness is evidently a hostile witness and represents the defendant in the case, I claim the right of examining him in the nature of a cross-examination.

Mr. JENNER: I object to that. This is not a hostile witness.

The COURT: I ruled on that the other day. He is hostile in one sense and not in another sense; that is, he is here; he is an officer of the defendant corporation; he is interested in it in a way, and under the advice and instruction of counsel and as an officer of this company he does not come here as a volunteer, he does not come here to force this evidence onto the Court. He answers it because he is directed to. Anything that is necessary in the nature of cross-examination the Court will permit.

Defendant objects. Objection overruled. Defendant excepts.

A. The last date is January 23, 1902.

Q. What is the title of this book; has it any title?

Same objection as to privilege, ruling and exception.

95 A. "American Lithographic Company, New York. Minutes. No. 1."

Q. Now, please turn to the minutes commencing with July 1, 1901, as contained in the book, and state to us what entries you find on that day or on any day of July, 1901?

Defendant objects on the ground that the matter is privileged, that the question is incompetent, and the matter cannot be elucidated in that way.

The COURT: The business of a corporation should never be paraded in court or anywhere else unless it be according to law and in furtherance of the interests of justice. I do not want to open this book or the reading of these minutes as to matters which do not relate to this controversy.

Complainant offers the book in evidence.

Defendant objects to its being offered in evidence. The book is the property of the defendant and cannot be put in evidence without its consent.

Mr. KNAUTH: I will ask to have it marked for identification.

Mr. JENNER: I object to its being marked for identification. The book is the property of the defend- and cannot be marked without its consent, and I object.

The COURT: Give it to the Court.

Mr. JENNER: I object to its being given to the Court.

The COURT: I instruct the witness to do it.

Mr. JENNER: I instruct the witness not to do that, not to hand it to the Court.

The COURT: What does the witness do as regards complying with the direction of the Court?

Mr. JENNER: I should be very glad——

The COURT: Never mind; we have got right to a point now.

96 Mr. JENNER: I claim the defendant's privilege to keep that book, as it is private property.

The COURT: Witness, do you refuse to pass the book to the Court

so the Court can mark it for identification and can refer to it intelligently?

Mr. JENNER: If all your Honor proposes to do is simply——

The COURT: Never mind what the Court proposes to do; never mind what this Court proposes to do; the Court will take care of that itself.

Mr. JENNER: Then I will addthis modification——

The COURT: The direction to this witness is to pass that book to the Court.

Mr. JENNER: I will add this modification to the instructions to the witness. If the object is simply for the Court to mark the book for identification so it can be identified hereafter, I have no objection to that. I object to the Court's examining the book, and therein I stand; the defendant stands on the section——

The COURT: The Court instructs the witness to pass the book to the Court.

Mr. JENNER: And I repeat the instruction to the witness.

The COURT: What do you say, witness?

WITNESS: I decline, sir.

The COURT: Then you better prepare an order. This witness is guilty of open contempt of Court in the instructions. Prepare an order committing him to jail until he complies with the order, and the Marshal will be ready to execute it forthwith. In order to enable this to be done the Court will take a recess until two o'clock.

Mr. KNAUTH: I understand the witness is still on the stand and directed to be here at two o'clock.

The COURT: Oh, certainly.

Recess.

97 Recess.

Mr. KNAUTH: I have drafted, if it please your Honor, an order in accordance with your Honor's direction (handing paper to Court).

Mr. JENNER: Before your Honor signs the order, I desire to state that I asked Mr. Knauth to let me have for my inspection a copy of the order, which he refused to do, and refused even to inform me whether there was a copy in court. I have read over the first page and there is a material mistake of fact to which I desire to call your Honor's attention.

Mr. KNAUTH: I want to say to your Honor, I handed to Mr. Jenner the original of the order which I have now handed up to your Honor.

Mr. JENNER: And I have read the first page only, and so far it contains a material misstatement of facts, to which I desire to call your Honor's attention.

The COURT: Enter the order, Mr. Clerk, and issue the proper commitment.

Mr. JENNER: Will your Honor direct that a copy of the order be served with the commitment papers.

The COURT: You can get it from the Clerk.

Mr. JENNER: The reason why I ask is that Mr. Knauth declines to serve the witness with a copy of the order.

Mr. KNAUTH: I did not intend anything of the kind; I could not do anything of the kind, to serve him with a copy of the order signed.

The COURT: The Court has signed the commitment, and the Marshal can then serve it. The order and judgment of the Court is now that he is in court, and must be imprisoned.

Mr. KNAUTH: I am informed that the Marshal of the court will arrest the witness upon the order which your Honor has signed, without any further warrant or commitment.

The COURT: How is that?

98 Mr. KNAUTH: I understand the Marshal of this court is going to arrest the witness upon the order of your Honor without any further warrant, without any further paper. That is the information which we have obtained from the Marshal.

The COURT: You will take your chances on that if you want to. I do not think I am called upon to be counsel and the Court at the same time.

Mr. KNAUTH: The Marshal will be here in a minute, and we can see him.

The COURT: You have the order attaching this witness in contempt, and to be imprisoned. My impression is decidedly that that is not justification for the Marshal to take him into custody and imprison him. You can take your chances on that.

Mr. JENNER: While we are waiting, another matter which is pending before your Honor, and that is the order made on Monday, the 5th, to the defendant, directing the defendant to produce books and papers.

The COURT: Well, are they ready to comply with that order?

Mr. JENNER: The defendant declines to produce the books and papers, and bases the declination upon the ground that the Court is without authority to require the production, that the time allowed was insufficient, that the description of the books and papers were too comprehensive, that the order was improvident in that respect, and that the witness is privileged under Section 724.

The COURT: That is not a question of witness.

Mr. JENNER: No, sir, that section provides that judgment by default shall go against the defendant in case they do not comply.

The COURT: I do not think they want judgment by default until they exhaust their evidence.

Mr. KNAUTH: No, I propose to proceed with the case and take my testimony. Therefore, I will recall Mr. Wilson to the stand in meantime.

99 FRANCIS A. WILSON resumed the stand.

Direct examination continued by Mr. KNAUTH:

I reside in New York City, 34 Gramercy Park. I am the secretary of the Henry Clay & Bock Company, and have been connected with the American Tobacco Company from June, 1898, to about February 1, 1903. During the years 1901 and 1902 I had a great deal to do with the advertising of the different brands of tobaccos and cigarettes manufactured by the American Tobacco Company,

and I also had charge of the sale of one brand of tobacco manufactured by the American Tobacco Company, and of that department, and the advertisement of that brand. That brand was called "Old English Curve Cut Pipe Tobacco."

Q. Had you anything during that time to do with pictures like the one that I show you now, marked Exhibit G for identification (exhibiting exhibit to witness)?

The WITNESS: Is it necessary for me to answer that question? Do you instruct me to answer it, your Honor?

Mr. JENNER: On behalf of the American Tobacco Company, for whom I am counsel, I state that there is an action pending by the plaintiff against that company which involves the manufacture and sale or publication of pictures of which the paper shown to the witness is alleged to be a copy; that the witness is priviliged against answering or making any disclosures by reason of any of his present or former agents or employees, on the ground that the action so pending is to recover penalties under Section 4965 of the Revised Statutes.

Objection overruled. Exception by defendant.

A. Yes.

Q. Please tell us what you had to do with those pictures?

Same objection, ruling and exception.

100 A. To decide on such pictures as we would use for advertising purposes. There were a great many submitted and considered and very few could be taken, only occasionally one would be suitable and it rested with me very largely to say which picture we would adopt as an advertising design.

Mr. Chapin submitted to me the design for this picture, Exhibit G; it was submitted to me for adoption and for the American Tobacco Company. I think it was in 1901. I could not give the time of year; to my best recollection it was in the early part of the year 1901. Mr. Chapin was then in the employ of the American Lithographic Company. He was their agent, that is, was acting for them, so far as I know. I had dealings with him before in regard to lithographic work. I do not think I had ever given any orders to him, but he had submitted other things, other business suggested. He had sugested other business, for advertising purposes. That was his work in our office.

By the COURT:

Q. You said that you knew he was acting for the American Lithographic Company?

A. For the American Lithographic Company; yes, sir.

Q. What I am getting at now is whether you have any basis for saying that other than his surmise or guess; is it based on any fact, that is what I want to get at. State to me what you knew, what dealings you had, so I can see whether that answer should stand or not?

Defendant objects to the question as incompetent. Objection overruled. Exception by defendant.

A. We in the office knew Mr. Chapin as the representative of the American Lithographic Company.

Defendant moves to strike out the answer as assuming
101 something that is incompetent and immaterial. Motion denied. Exception by defendant.

The WITNESS: That he was the one from that company to have suggestions as to lithographic work.

Defendant moves to strike out the answer as incompetent. Motion denied. Exception by defendant.

Q. Had the American Tobacco Company given any orders to the American Lithographic Company for this prior to that time?

A. Yes, sir; and given them to Chapin, I should say as the result of Mr. Chapin's solicitation of orders; whether the orders were handed to me or not, I do not know.

Defendant moves to strike that answer out as incompetent, secondary evidence, and as a conclusion. Motion denied. Exception by defendant.

Q. Had he solicited from you that which you did give and which were executed afterwards by the Lithographic Company?

Mr. JENNER: I object to the question as calling for a conclusion.

The COURT: I wish you would not interrupt the Court.

Mr. JENNER: It grieves me to interrupt, but I must object to the witness giving incompetent testimony.

The COURT: Pretty soon you won't interrupt any more. This is not for the jury, and it is not going on the record, it is simply where the Court is trying to ascertain whether this witness knows anything that is contempt so that the Court can rule on it.

Mr. JENNER: If your Honor will please.

The COURT: Now, wait a moment. Now please take your seat. I am very sorry there should be any such exhibition.

Mr. JENNER: I am sorry; I am trying to protect my client's interests.

The COURT: Orderly procedure will be protected.

102 Mr. JENNER: Does your Honor forbid me making any objection; if so, I will discontinue?

The COURT: The Court is trying to find out for the orderly proceeding and for the protection of the parties, so as not to have before this jury evidence that might be prejudicial, and which in the end the Court might not be able, even if it so instructed the jury, from having its influence. In order to do that it is essential to know just what the knowledge of this witness is. Evidently it depended on this man. He means to tell what is true and nothing more and nothing less, and I want to see if there is anything here which he does know which would be competent evidence in the case.

Mr. JENNER: Will your Honor allow me further to object to further interrogatories by the Court of evidence?

Q. You had interviews with Chapin and then afterwards you received the work that he did solicit, is that it?

A. When you say "you" you mean me, personally, or are you speaking of the company, the method of procedure?

Q. You represented the company, didn't you, in the matter?

A. Only a very small part, only just certain things that I in my own dealings had to produce; there were many others, and Mr. Chapin was the general representative of the company in all our offices. I do not recall ever having given Mr. Chapin any order prior to that time myself.

Q. Did he solicit of you or in your presence the doing of certain work?

A. Yes.

Q. You do not know yourself whether those orders were given to him or not?

A. I do not.

Q. But you know that the orders were given and filled by the Lithographic Company; you know that, do you?

A. I have reason to think so. I will state that to be my belief.

Q. Do you know that work was done by that company?

A. Yes.

Q. And do you know whether or not the company paid
103 for it, the Lithographic Company?

A. I would not know that.

Q. You would not know?

A. I would not know that; in my general knowledge of the business of the company I would not know it personally, so I could state it; I would assume it; I could not say that I knew it.

The COURT: Gentlemen, if by any way you overheard what was said, you will pay no attention to this, if you overheard it. If you heard anything, it is not thus far evidence in the case. Now, then, you may inquire of this witness, get just the facts, because certain deductions may or may not be proper; get just the facts that he knows.

By Mr. KNAUTH:

Q. Will you state to us, please, what Chapin submitted to you in the year 1901 in the way of a design?

A. In the way of a design?

Q. Yes, a design relating to this picture?

A. Mr. Chapin brought to my office a copy of the *Gartenlaube*, and on a page of that magazine was a small wood engraving, the width of the page and about half the depth of the page of that design.

Q. You mean Exhibit G for identification?

A. I do not know what that is, but that design, it is that picture, and the German word for Chorus.

The COURT: He says he does not know that. Show him the mark, so he can see.

Exhibit G is exhibited to witness.

Q. It is marked for identification Plaintiff's Exhibit G.

By the COURT:

Q. That is the one?

A. He showed me a design the same as Exhibit G.

104 By Mr. KNAUTH:

Q. Was the design in colors?

A. No, no; black and white; black ink on white paper.

Q. And of what size was it?

A. The size of that green book there (indicating). Perhaps you know the *Gartenlaube*, the size of it.

Q. That size (exhibiting book)?

A. The other way, the full width of the page and about half the depth of the page. Eight inches by four, that is approximately the size.

Q. What did he say to you on that occasion?

A. I cannot state Mr. Chapin's words.

By the COURT:

Q. Give the substance to the best of your recollection?

A. The substance of what Mr. Chapin said, to the best of my recollection was, "Mr. Wilson, here is a picture that will make a good advertisement for Old English Curve Cut Pipe Tobacco. You have had the poster by Rumler showing an Old English squire with a pipe"—we had used that for over a year and in a general way there was a resemblance between our first picture and this picture, and that was the cause of making the suggestion—"Here is something that will follow along the line of Old English Curve Cut. Now, here, wouldn't it be a good thing to reproduce this picture and make an advertising show card of it"?

Q. What did you say about it?

Mr. JENNER: Objected to as incompetent.

Objection overruled. Exception by defendant.

A. I think I said it would be; I was out for advertising, the best advertising I could get, and I thought it was a capital idea. I saw the resemblance between the old and the new one. That was a picture I had painted by Alexander Rumler, that was a picture I had made; we originated it.

105 Q. Were there any lithographs made of that picture?

A. Oh, yes, sir; we used them for a couple of years.

Q. You used them in your company's business?

A. Yes, sir, for Old English Curve Cut.

Q. Who made those?

Mr. JENNER: Objected to as incompetent and irrelevant.

Objection overruled. Exception by defendant.

A. The H. H. Thomas & Wiley Lithographic Company, Twenty-fourth street, New York City.

Q. When you had this conversation with Chapin, did you say to him anything about an order?

A. No.

Q. Did you have any conversation with him afterwards about the same matter?
A. Well, I think I must have.

Mr. JENNER: I move to strike out the answer.
Motion denied. Exception by defendant.

By the COURT:

Q. What is your recollection as to whether you did or not?
A. That I did.
Q. That is your best recollection?
A. Yes, sir, that I did.

The COURT: He says his best recollection is he did. Go on.

By Mr. KNAUTH:

Q. Now, what do you remember about any conversation subsequent to this time with Mr. Chapin?
A. I do not remember anything about any subsequent conversation; that is, as to what was said by him or by me.
Q. Did Chapin submit any design to you in the year 1901?
A. Well, you mean different from the one I have mentioned?
Q. I understood that previously he had only shown you a woodcut?
A. Yes, sir.
106 Q. But not any design?
A. That is the design; that was the design.
Q. That is what you call the design?
A. Yes, sir, that is the design of the picture—the drawing of the picture.
Q. Did he subsequently send you any pictures like this Exhibit G?
A. Mr. Chapin brought me a water color painting made by Alexander Rumler the same artist who made me other pictures, and submitted it. That was in 1901, I think, when he submitted to me that water color picture. I said I did not like it. It was not good enough; it did not conform to my ideas of what it ought to be. That water color picture was substantially like this Exhibit G in the general design of figures and arrangements. He took it back and kept it for a while and brought it back again; Rumler had done some more work on it, this was within a month after the first presentation. I did not give him an order. I was not satisfied with it. I do not remember, exactly whether it stayed in my office then or whether it was taken back, taken away; I do not remember clearly what was said just then about that sketch.
Q. What next do you remember about pictures like this Exhibit G?

The WITNESS: Must I answer that?
The COURT: Yes, you will have to answer. I direct you to answer.

By Mr. JENNER:

Q. Are you a stockholder of the American Tobacco Company?
A. Yes, sir, and have been for a number of years and I claim my

privileges as such stockholder in view of the action pending against the Tobacco Company to recover penalties under Section 4965 for infringement of the copyright on trial in this case, I claim my privilege from answering.

107 To the COURT:

I am not a stockholder of this defendant, nothing to do with this defendant now. I am simply a stockholder in the American Tobacco Company. I was then and have maintained that relation ever since.

Mr. KNAUTH: I ask that the objection be overruled and the witness be directed to answer.

The WITNESS: There is a suit pending against us.

To the COURT:

There is a suit pending against the Tobacco Company by this plaintiff here in connection with violating the copyright.

Mr. KNAUTH: Yes, that is conceded that there is a suit pending here now against the American Tobacco Company, not against the witness.

The COURT: I understand. See if I get it right. The Court cannot rule very well until it gets the facts. Now, if I understand, this same plaintiff here has brought suit against the American Tobacco Company for an infringement of a copyright, growing out, I take it, of this same transaction, printing and selling and exposing for sale, &c., these lithographs, this copyrighted picture.

Mr. KNAUTH: Yes.

The COURT: And that suit is pending and undetermined, and this witness is interested, of course, as a stockholder in that company, with it; so that his evidence that he gives here makes disclosures that may affect the rights of that company and the determination of that litigation may result against him, and that may result in his having to pay money, it may, and the jury must not surmise anything about it—this is not for the jury at all or for your consideration—and of course it might affect, it probably would affect, if there was any dividends growing out of it, the dividends that this gentleman
108 would receive on his stock. Now, the contention is in that situation that this witness is privileged from giving evidence here as to this transaction, as I understand it.

Mr. JENNER: There are two suits. Your Honor was entirely right in your statement. There are two suits pending against the Tobacco Company; one is for the seizure and forfeiture of the sheets, and the other is for the money forfeiture, $10 per sheet.

The COURT: There are two actions for penalties and forfeitures?

Mr. KNAUTH: Yes, that is about right.

Mr. JENNER: I think your Honor has stated it about in accordance with the facts.

The COURT: The Court understands, and in the bright daylight of those facts, as matter of law, that there is no privilege which this witness can claim in this case, and so directs the witness to answer, and to that I give the defendant an exception.

Exception by defendant.

The COURT: That action against the American Tobacco Company, is that a suit for penalties?

Mr. KNAUTH: In a sense it is; it was for the seizure of the sheets in question.

The COURT: It is a forfeiture.

Mr. KNAUTH: It is a forfeiture, yes.

The COURT: Let that fact appear on the record in presenting the case.

Q. What next do you remember about pictures like this Exhibit G?

A. Well, we were considering what to do with the Rumler water color, which was not wholly satisfactory, and while that matter was pending I received a telegram stating that a copy of this same design had been found in Chicago, a framed copy, and stating, suggesting it was a life-sized reproduction, and that it would cost so much, I do not remember how much, and either questioning or suggesting that that copy be bought in connection with this reproduction of the design which we considered with the wood-cut.

109 By the COURT:

Q. You say a copy of this same design. You mean this Exhibit G?

A. Yes, sir, it is the same design.

Mr. JENNER: I move to strike out the evidence on the ground that it is secondary.

Motion denied. Exception by defendant.

By Mr. KNAUTH:

Q. What did you do?

A. I wired back to get it. I got it; it came to my office soon after that; within a week after that time. I would not be able to say whether it was water color or not, but it was a print that had been colored by hand. Now I do not think those are called water colors. I think they are called oleographs; I think that it is the technical name for it; I do not think they are water colors, painted entirely in water colors. Let me make this answer. It is a colored print, that would describe it. I do not know just exactly what was done next, just what action was taken.

By the COURT:

Q. What did you do with it?

A. It hung in my office for a while and was compared with the water color that Rumler made favorably, it was better; and this is my recollection, that we planned to take a part of the picture—we did not take it all.

Mr. JENNER: I move to strike out what they planned to do; it has no relation to the issues in this case what they contemplated doing; it is incompetent and irrelevant.

Motion denied. Exception by defendant.

Q. State what you did?

By the COURT:

Q. What I want to know is whether this is something your
110 company did make yourselves, or did you plan it with somebody outside?

A. The planning was with reference to the execution of the picture. If this picture was compared with the other, the big picture that was received from Chicago, it would be shown that the bottom part of the original large picture is missing from that. We made a mat and covered over the large picture showing in view all of the picture we wanted to reproduce in order to get the photograph larger; that is what I meant; we planned how to use it. The picture that I described I received from Chicago was larger than this one, showed more of the figure, more of the ground and of the floor. When I say I planned I mean I made arrangements to pick out parts of that picture and use so much of it as appears here.

By Mr. KNAUTH:

Q. With whom did you do this?

A. To the best of my recollection it was a Mr. E. N. Blue, an artist who worked in connection with my department; I think it was his suggestion to do that; it would be a better rendering of the picture, and in that way I produced a somewhat smaller or reduced picture.

By the COURT:

Q. Did it result in a picture of this size?

A. It did; yes, sir.

By Mr. KNAUTH:

Q. And by this size you mean to refer to Exhibit G for identification?

A. Yes, sir. I do not know exactly what happened next, but my recollection is about that time when the original design that we had prepared was satisfactory we decided to use it.

Mr. JENNER: I move to strike that out as incompetent, irrelevant evidence against the defendant.

Motion denied. Exception by defendant.

111 By the COURT:

Q. You may state whether or not of that a design had been made of this size and of this photograph. How is that?

A. Yes.

By Mr. KNAUTH: What was done with that design?

By the COURT:

Q. And then you say you decided to use it?

A. Yes, sir. I decided to use it, as brand manager of Old English Curve Cut as an advertisement, that drawing. The name of my department was Old English Curve Cut Department. When I had

decided to use that picture there was not any legend on the picture, as follows: "Old English Curve Cut Pipe Tobacco," as appears on Exhibit G for identification.

Q. What did you do next with reference to producing copies or procuring copies of this design?

A. I decided to give an order to the supply department, the purchasing department of our business, for copies of it. I cannot recollect issuing any instructions as to where or how to procure them. I remember that thereafter I received copies of that design. I received copies of that design in 1902. Proofs would be brought in, several proofs covering two or three months' time, the first of the year I should say. I recollect that I had discussion or conversation about these proofs with Mr. Chapin.

Q. Do you recollect having any discussion with him about the words "Old English Curve Cut Pipe Tobacco," which are printed on top of the picture?

By the COURT: What he wants to know is whether there was anything said between you and Chapin about these words that now appear on there, about putting them on or not putting them on.

A. Having the necessary talks about having that line drawn "Old English Curve Cut Tobacco," having the thing sketched
112 and traced there; that is, an extra printing above the lithographic printing.

The COURT: Did you tell him that in words or substance; did you authorize him or direct him in words to have those words on it?

A. Yes; in substance.

Q. Did you thereafter receive any copies of this chromo, Exhibit G for identification, exactly as they appear here before you?

A. Yes.

Q. When was that?

A. In 1902.

Q. Did you receive them in quantities?

A. Only a few. We had a great many proofs. We had—I think I had on my desk as many as 20 proofs of different stages of the pictures—some with gilt border, some without and some with varnish and some without, before we decided to have the picture printed.

Q. What I want to know is whether you received copies like Exhibit G for identification?

A. Yes, sir.

By the COURT: From whom did you receive them; who did you get them from?

A. I do not know; they were brought into my office.

Q. You do not know by whom?

A. No, I do not know by whom.

To Mr. KNAUTH:

I remember on the 23d of June, 1902, the visits of a Marshal of this court. The Marshal came to the office and Mr. Schrenk and one other whose name I do not now remember.

By Mr. KNAUTH:

Q. Now, will you state how many copies you had on the day the Marshal called on you on June 23, 1902?

A. All that he found. I did not count them. I do not know how many.

To the COURT:

I did not interfere. They took all there was in sight there.

113 By Mr. KNAUTH:

Q. Will you please look at this paper and tell us whether the blue ink stamp on that paper is a stamp used by your company and in your department (exhibiting paper to witness)?

A. Yes, I recognize it.

Q. Will you tell us what you recollect about this paper which I have just handed you?

A. My principal recollection of this paper is you showed it to me the last time this was tried, and I told you I could not be sure I had ever seen this paper before. I have no recollection of the paper itself or of the matters stated in it.

Q. Did you give any instructions to have this paper prepared which I have shown to you?

Mr. JENNER: I object to that as incompetent and irrelevant.

Objection overruled. Exception by defendant.

A. Yes.

To the COURT:

I instructed some one there in my employ to have this paper made, which was made; it was prepared there in my office.

By Mr. JENNER:

Q. That paper before you was not the one that you directed to be prepared?

A. Mr. Knauth asked me if I had any recollection of the subject matter of this paper. I have answered yes.

By Mr. KNAUTH:

Q. After you had given these instructions to your clerks to prepare such a statement, were you handed that paper by them?

A. I cannot say that I have ever seen this piece of paper before except in court.

114 By the COURT:

Q. There is a stamp printed on it. This is evidently a copy of something, isn't it, the one shown you?

A. A letter press copy.

Q. Now, on there there is a stamp on the letter press copy. The stamp that made those impressions, where was it kept?

A. In my office and all of the clerks had access to it and the use of it. There were several who had stamps like that on the desk for

stamping bills, &c., papers prepared in my office. I think that is the receiving stamp. And those were not permitted to go out of my office. If anybody got it it was clandestinely taken.

By Mr KNAUTH:

Q. Will you look once more at that paper and tell us what do you recollect of the original of that paper.

A. That a paper with this matter was prepared by me at Mr. Parker's request and handed by me to him. Mr. Parker is counsel for the American Tobacco Company. I have not brought with me the original statement of which this paper in my hand now purports to be a press copy.

Mr. KNAUTH: At the present time I will have the paper to which the witness has testified marked for identification.

Marked Plaintiff's Exhibit I for identification.

Q. Did you thereafter send any such pictures like Exhibit G for identification back to the American Lithographic Company?

A. No.

Q. Do you remember that you had sent a number of these pictures to the Deuther Manufacturing Company of Buffalo that had been sent for framing purposes?

A. Some were sent for the purpose of framing them.

Q. Did you keep any books by which the items shown on the paper for identification, Plaintiff's Exhibit I, appear or would appear?

115 A. There would be an order book that would show any order given, and I think that is all we would have by way of a record. There might be some memorandums, that is, there might have been at that time, by way of a record of what came to the office in the way of proofs or copies, but we did no bookkeeping in our room; it was simply the sales room of a brand of tobacco.

Q. Do you know who kept that order book?

A. I do not know what one, it was called an order book in charge of no one in particular; perhaps at some time there would be one clerk or another who would be in the habit of writing out the orders in the book. There were three or four in my room at that time, and I cannot be certain. I think the statement which I handed to Mr. Parker in the office of the American Tobacco Company was the same as the Statement for Identification, Plaintiff's Exhibit I. I have no reason to think it was not. At that time that statement was correct, so far as I knew. I did not make the statement.

Mr. JENNER: I move to strike out the witness' answer that the statement is correct, as he had nothing to do with the making of it.

Motion denied. Exception by defendant.

Mr. JENNER: I move to strike out the reasoning of the witness.

Motion denied. Exception by defendant.

The COURT: This was made in his office by the ordinary office force, and until the contrary appears it is presumed to be correct.

If it is proved that they do not make correct copies there, it may be different.

Exception by the defendant.

By the COURT:

Q. Now witness, this paper refers—you say it was made in your office by some of your clerks—to a statement of a certain
116 print, does it not?

A. Yes, sir.

Q. It gives the name by which that print was known, advertising print, I take it, or picture that you had there in your office and were using in your business. Is that right?

A. Yes, sir.

Q. Did you have in the office or the office of that company anywhere, whether in your department, or elsewhere, any book or books that showed the number of the prints of that nature or coming under that description, on hand or with the company at that time; did you or didn't you?

A. Yes.

The COURT: Now, you may answer whether that book was kept in your department or some other department. You need not state what department, whether it was in your department or some other department.

The WITNESS: I will have to explain. The order book was in our department and the record book was in the supply department. The order book would be in my room, and the record book for deliveries would be elsewhere. I had in my department an order book which showed the number of orders and in another department was a delivery book which showed the numbers delivered. I sometimes directed the delivery at other places than at our office.

Q. And did you keep in this delivery book a record of those that had been delivered at other places, or orders delivered at other places?

A. I suppose so. We call it the record book.

Q. You never saw that?

A. No, sir, it is out of my charge.

Mr. JENNER: I move to strike out the witness' supposition.

The COURT: He says he does not know.

Exception by defendant.

The WITNESS: That was somebody else's book outside of our department—the record.

117 To the COURT:

I do not know of my own knowledge what the order book shows.

By Mr. KNAUTH:

Q. Do you know how many you ordered?

Mr. JENNER: I object to that as assuming that he ordered any; it does not appear from the evidence that he has ordered any.

By the COURT:

Q. State whether or not after it was finally agreed upon did you order any number; did you or didn't you; you need not state how many.

Mr. JENNER: I object to that as calling for a conclusion.
Objection overruled. Exception by defendant.

The COURT: It calls for a fact, whether he did or not. Did you order any in the first place?

A. Yes.

Q. Did you give an order for a specified number; state whether you did?

Mr. JENNER: Same objection.
Objection overruled. Exception by defendant.

A. I did.

Q. Now, the question is, you may state how many you ordered?

Mr. JENNER: Same objection.
Objection overruled. Exception by defendant.

A. You instruct me to answer?

Q. Yes, I instruct you to answer.

A. To the best of my recollection the decision was made to have 20,000 copies, with the printing on, 5,000 copies without the printing on, and 100 copies on cloth without printing.

118 Mr. JENNER: I move to strike out the evidence as incompetent and not competent against the defendant.

Motion denied. Exception by defendant.

The COURT: I am not holding now, understand, that the defendant here has yet been connected with it. The witness says, as I understand it, he gave orders to have printed and delivered a certain number with this printing on, a certain number without this printing on, and a certain other number on cloth.

Q. 25,100?

A. Yes, sir.

The WITNESS: There may have been 25,000 with the printing; I cannot tell from recollection. It is either 20,000 or 25,000.

Q. You decided to have that number printed and delivered?

A. Yes, sir.

Q. Now, then, state the *modus operandi* of giving those orders?

A. The order would be written out in the order book.

By the COURT:

Q. In the first place you decide what you do, don't you?

A. Yes, I did. I made my decision to have so many printed, told my clerk to have an order made out in the order book and told him what to put in, and then he fills out the order. I sign it after seeing that they are correct. Those orders were directed to our supply department, the next room to mine. That is, it was directed to them to have those printed.

Q. You need not state what the *company* was, but just answer

whether or not it was assumed. Did those orders state in them who were to print or supply these pictures, calling them pictures or prints, whatever they are? Did you have a space to tell who was to print them?

A. I think they did.

119 Q. They have got then the number, and who was to print them, but of course directed to your supply department that they were to go to work and see that you had them?

A. Yes, sir.

Q. Now, you signed them?

A. Ordinarily, I think I did. I cannot say that I signed these particular orders. One of my clerks might have signed my name with an initial. I either signed it myself or directed a clerk to do it.

Q. And then where did those orders go?

Mr. JENNER: Will your Honor allow me to move to strike out the answer of the——

The COURT: Each and every question put by the Court to this witness is objected to. On what ground?

Mr. JENNER: On the ground of incompetency and irrelevancy against the defendant.

The COURT: The objection is overruled, and I give you an exception. Now you move to strike out each one. You make that motion separately?

Mr. JENNER: I make them separately.

The COURT: That is denied, and I give you an exception. Now you make a motion to strike them all out, and the Court denies that motion and gives you an exception.

The witness, by direction of the Court, leaves the stand.

CHARLES EDDY resumes the stand:

The COURT: Witness, are you willing now to come back here on the stand to produce the book and hand it to the Court when it tells you?

The WITNESS: Yes, sir, certainly.

The COURT: I want to get it here if we can and get that phase of it out of the way.

120 FRANCIS A. WILSON resumes the stand.

By Mr. KNAUTH:

Q Did you receive any of those copies which were made on satin?

A. Yes; not more than t-; there are several of them the Marshal took away.

By the COURT: Did you give any instructions to the manufacturer of these prints, lithographs or whatever you call them, pictures—you know what I mean?

A. Yes, sir.

By Mr. KNAUTH: Did you give the manufacturer any place where to send them?

A. Instructions were sent from the office in due course.

Mr. JENNER: I move to strike that out as incompetent.

Q. Who sent them?

A. I do not know. It was the business of my clerks, those under my directions, and I gave those instructions. I decide.

Mr. JENNER: I move to strike that out as incompetent.

Motion denied. Exception by defendant.

Q. Tell us what instructions. Can you remember the names of the clerks or of any clerk to whom you gave those instructions?

A. These two young men, whose names I have mentioned, were the ones who did the detailed work in my room during that period, to the best of my recollection. It was to one or the other, I do not know which. Of course it would be possible that somebody might have been in their place for a little time. I might have given the instructions to my stenographer in notes to be written out and handed to the clerk- and they send them off with the office stamp or initial, or something of that kind. It would go through my stenographer to these clerks in that way.

Q. Now, you may state what those instructions were, if you desire.

A. Is that what you want?

Mr. KNAUTH: Yes, that was my object.

The COURT: Now, what is the objection? Anything different from what you have made?

121 Mr. JENNER: My objection is on the same ground as incompetent and irrelevant against this defendant and calling for a conclusion.

Objection overruled. Exception by defendant.

The COURT: You will remember, Mr. Wilson, that you have been asked how many you ordered printed, and you told, and then you were asked if you gave orders for the delivery of any of these pictures or lithographs or hangers, or whatever you call them, to different parties, and you said you did. Now, what he wants to know is the names of the persons to whom you directed these deliveries to be made. Is that what you want?

Mr. KNAUTH: Yes.

The WITNESS: No. I cannot tell the names of the people to whom deliveries of these pictures were made.

Q. Have you any recollection about deliveries made to the Deuther Manufacturing Company of Buffalo?

Mr. JENNER: Objected to as incompetent and irrelevant against the defendant.

Objection overruled. Exception by defendant.

A. Nothing whatever about deliveries made to them.

Q. Were all your orders to the effect that the prints or lithographs were to be delivered to you, to your office?

Mr. JENNER: I object to that on the same ground.

Objection overruled. Exception by defendant.

A. No; we had none there except the few that were to be passed on.

122 By the COURT:

Q. Now, witness, you have an idea—I am not going to ask you who you thought were printing, because your thoughts are not evidence; I am not asking you that—but you have an idea in your mind who was printing these hangers, as you call them, these lithographs. Did you give, I will ask you first, verbally, any orders to that person or firm or corporation, whichever it was, as to the delivery of any number of these pictures?

A. Yes, I did personally.

Q. Now you have got that. Now did you give in addition to that any written order or direction for any number or the delivery of any number? Did you give one yourself that you signed?

A. I cannot be sure that I signed it. I either signed or authorized it to be signed by somebody else.

By Mr. KNAUTH:

Q. Now, confining yourself to your verbal order, to whom did you give any order, to what manufacturer?

A. I do not know that I gave an order to any manufacturer.

By the COURT:

Q. To whom did you give those verbal directions?

A. I do not know; those copies could not have been in my room without my saying to somebody, "Well, send 100 copies for me to look over and I will judge of the run of the edition whether they are well printed," &c. Now, I do not know who I gave that order to. It might have been to one of my clerks. It might have been a representative of the supply department or a representative of the printing department.

Q. A few moments ago I asked you in substance if you gave a verbal order?

A. Yes.

Q. To the manufacturer?

A. I did not understand you to say to the manufacturer.

123 Q. Didn't I say that?

The WITNESS: I beg your pardon; I did not understand you.

Q. Do you mean to say you did not understand me?

A. No, I understood you to say did I personally give an order to the manufacturer.

Q Yes, and I understood you to say you did.

A. I beg your Honor's pardon. I am sorry we misunderstood each other.

By Mr. KNAUTH:

Q. Have you made any search for the original paper, of which this exhibit for identification Plaintiff's Exhibit I is a copy?

A. Why no, Mr. Knauth, I have not, because I have not been connected with the company for three years; I have had no access to their files; I have been out of the company part of the time, and I am in another business. I have not the remotest idea where the original is.

JUNIUS PARKER, called as a witness for the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. KNAUTH:

Q. What is your occupation, Mr. Parker?

A. I am a lawyer. I am connected with the American Tobacco Company as a lawyer; I am in the Law Department of the American Tobacco Company, with the present American Tobacco Company since its formation by merger in October, 1904; with the other American Tobacco Company since March, 1899. I am interested only in the American Tobacco Company. I was interested only in the American Tobacco Company which was in existence in the years 1901, 1902 and 1903. I had been connected with that company from 1899 until its merger with other companies in 1904, and that was in the character of a legal adviser. I attended to some of their business affairs in a sense and way. Questions were put to
124 me of some difficulty. I had my offices right in the office of the American Tobacco Company.

Q. You are a member of the bar of the State of New York?

A. Yes; and have been for several years.

To Mr. KNAUTH:

I am acquainted with a controversy about certain posters like the poster which has been marked for identification Plaintiff's Exhibit G. The letter dated June 27, 1901, now handed me, is my letter (paper handed to witness). It was a letter written by me as one of the assistant counsel of the company as its representative. I saw my signature and I saw the paper.

Mr. KNAUTH: Offers that letter in evidence.

Defendant objects to it as incompetent and irrelevant against this defendant. Objection overruled. Exception by defendant.

By the COURT:

Q. You admit, I suppose, your authority to write the letter?

A. I had no distinct official authority, of course. It was the result of inquiry that I made. I did it in the discharge of what I considered my duty, in the due course of business.

Marked Plaintiff's Exhibit J, and the following is a copy thereof:

"The American Tobacco Company,

111 Fifth Avenue.

Law Department: W. W. Fuller, Counsel; Junius Parker, Ass't.

NEW YORK, *June* 27, 1901.

Mr. L. H. Schutze, Manager, The Berlin Photographic Company, 14 E. 23rd Street, City.

DEAR SIR: I have taken up the matter about which you called on me yesterday, to wit, our infringement of your rights under
125 your copyright of the picture 'Chorus.' I find by making inquiry of our Advertising Department that we did give an

order to American Lithographic Company for advertisement such as mentioned by you, but the American Lithographic Company has never furnished them, and they have never been distributed by us. Several samples have been furnished us from time to time, but our Advertising Department assures me that there have not been any of these pictures put out by us in any way whatsoever. Lately, and before I saw you, this company has rejected all that the American Lithographic Company had prepared, the rejection being on account of the fact that the mechanical execution was not as desired. At the time it made its contract to deliver us these pictures the American Lithographic Company contracted and warranted that our distribution of them for advertising purposes in the United States would not infringe any adverse copyrights, or make us otherwise liable. I say this to you hoping that I am thus doing you a favor and also the American Lithographic Company. That company is a reputable company and evidently believes that it has the right to dispose of pictures such as it was about to dispose of to us.

It is unlikely that we will ever desire to make a distribution of this picture because of the rejection which I have already referred to. I have cautioned our Advertising Department, however, and there will certainly be no distribution until after I have conferred by letter or otherwise with you.

Thanking you for your courtesy in calling the matter to my attention, I am,

Yours truly,

J. PARKER."

The COURT: Perhaps I ought to ask the purpose for which
126 you offer that letter so there will not be any misapprehension. What is the purpose for which you offered that letter of Mr. Parker?

Mr. KNAUTH: The purpose for asking the witness whether he has the contract referred to. He refers to a contract in that letter between the parties, and I want to get that contract and see what it is.

The COURT: I want to say now—let me take that letter so as to be sure (paper handed to Court). This, gentlemen of the jury, and these statements here, it is not in evidence whatever; have that in mind now. It is a mere declaration of Mr. Parker reciting information which he got after talking with his company, The American Tobacco Company. This suit is against the Lithographic Company. Now, you are not even to infer in any possible way from this that the Lithographic Company did print any of these pictures or that they printed one or furnished one from this, because this won't bind them in any way even remotely and cannot be used for any such purpose, to show that they printed one of them or any number of them or furnished them. While I have admitted it, it cannot be used for any such purpose. Bear that in your minds.

Defendant moves to strike out that letter as incompetent and irrelevant evidence. Motion denied. Exception by defendant.

Mr. KNAUTH:

Q. Now, Mr. Parker, I will show to you a letter dated April 25, 1902, and addressed to the Berlin Photographic Company, and ask you whether you wrote that letter and whether you wrote it on behalf of your company (handing paper to witness)?

A. I wrote it, yes, and I wrote it on behalf of the company, as I did the former letter in the same sense as I have testified.

Mr. KNAUTH: I offer it in evidence.

Mr. JENNER: Objected to on the ground that it is incom-
127 petent and irrelevant as against this defendant.

Objection overruled. Exception by defendant.

The COURT: But it does not prove, gentlemen of the jury, you must not take it as evidence. Of course it is evident that this company did authorize the distribution of these pictures "Chorus." This is not evidence and cannot be used as evidence of itself that the American Lithographic Company printed any of these pictures or furnished any of them to anybody, or offered or exposed any of them for sale.

Mr. JENNER: Then I respectfully submit it ought not to be read to the jury.

The COURT: I think that is true, and still the Court is inclined to let in everything that goes into the case for any purpose; the jury have a right to hear it under a proper construction, and, of course, this is proper enough to show that Mr. Parker, as the legal adviser, did authorize the distribution of the show card and it cannot be used for any other purpose. Do you want to read it to the jury?

Mr. KNAUTH: I will not read it at the present time.

The COURT: Very well. It may be received in evidence, and on your consent it won't be read to the jury unless there should be a phase of this case in which it might become necessary.

Exception by defendant.

The COURT: You except to the ruling that it shall not be read to the jury or the admission?

Mr. JENNER: I except to it for its regularity. I do not know whether I, myself, have a right to comment upon it or not; I do not know whether counsel have a right to comment upon it or not, and I do not know whether your Honor will have a right to com-
128 ment upon it in your charge, and as I have, myself, not read it and I do not know what is in the paper.

The COURT: You said you excepted to the ruling, and the ruling I made was it should not be read to the jury.

Mr. JENNER: Whatever ruling was made in respect to it, I except.

The COURT: Take this, stenographer. Counsel for the defendant objects to the ruling of the Court, that this letter shall not be read to the jury and excepts to its ruling that it shall not be read to the jury.

The letter is marked Plaintiff's Exhibit K, and the following is a copy thereof:

"The American Tobacco Company,
111 Fifth Avenue.

Law Department: W. W. Fuller, Counsel; Junius Parker, Ass't.

NEW YORK, *April* 25, 1902.

Berlin Photographic Company, 14 E. 23rd Street, City.

GENTLEMEN: In June, 1901, I wrote you, stating that I would not authorize the distribution of the show card W. Dendy Sadler's picture 'Chorus' by The American Tobacco Company, without first notifying You.

I am now informed by the American Lithographic Company that the above named picture never was copyrighted and does not at the present time appear with any copyright notice on it, and that the American Lithographic Company are advised by their attorney, Mr. Wm. A. Jenner, of Wetmore & Jenner, that that picture not being copyrighted in accordance with the terms of the law, their clients are within their rights in making such use of it as they see fit.

129 This being the case and the American Lithographic Company agreeing to hold us free from all damage, I have advised our company that it may circulate the picture, and I apprehend that it will do so.

Yours truly, J. PARKER."

The COURT: I will adhere to that all the same. It is not proper for the jury at this stage of the case.

Q. Previous to writing this letter of June 27, 1901, had you any conversation or consultation with the American Lithographic Company with reference to these prints.

Mr. JENNER: I desire to caution the witness that the defendant does not excuse him from any obligation which he owes to the defendant as counsel.

Mr. KNAUTH: I do not understand that the witness is counsel for the defendant in this case, the American Lithographic Company.

The WITNESS: If you will let me state, if I may state in answer to the question, I will say this, that I do not recall what I have done, so far as consulting with the American Lithographic Company before the writing of that letter of 1901, and I feel I ought to be permitted to say I had forgotten of the existence of that letter and did not know of the existence of either of them until you showed them to me, and the letter does not recall to my mind whether I had conferred with the American Lithographic Company or only with the officers or employees of the American Tobacco Company when that was written——

Q. Did you confer with the American Lithographic Company between the date of that letter, June 27, 1901——

130 By the COURT:

Q. Let me ask you, in the first place, are you the attorney or counsel for this defendant?

A. Not in the sense of being regularly employed by them and not in the sense of being compensated by them, but I have felt in this particular litigation I occupied somewhat a position of counsel.

Q. Have you been employed by them as attorney or counsel in this matter?

A. I have not been employed by them in the sense of having been paid a retainer; I have been conferring with and talked with them, by some of their officers, and I have been conferred with with respect to this litigation, talked with by their counsel, Mr. Jenner.

Q. You are counsel and attorney for the American Tobacco Company?

A. Yes, sir.

Q. In your own suit?

A. Yes, sir.

Q. Of course you conferred together, but that is not the question. I think you know what I mean by counsel.

A. I am not in the ordinary acceptation of the term the counsel of the American Lithographic Company.

Q. Have you been employed?

A. I have not been employed, and they do not owe me any fee.

Q. Now then, at the time you wrote these letters, were you then in their employ as counsel or acting in their employ as counsel?

A. I certainly had not been employed in the sense that I had a right to accept any compensation whatever.

Q. Had you been employed by them at all? You were making inquiries in regard to this claim. At that time when you were making inquiries, were you acting for them or for the American Tobacco Company, which?

A. Even if I conferred with them, I was acting for the American Tobacco Company, and in the interest of the American Tobacco Company.

Q. And conferred with them as such? Were you acting in
131 the interests of the American Lithographic Company?

A. My interests were for the American Tobacco Company.

By Mr. JENNER:

Q. Have you been consulted by the American Lithographic Company, and in your professional capacity?

A. Yes, sir.

Q. About the time of these letters?

A. As I say, I was not adverting to the fact that such letters existed until to-day, and those letters recall very little of the matter to me; it had passed entirely out of my mind, and I cannot say when the first conversation was; it was likely telephone talks and other talks.

By the COURT:

Q. Did you sign those Exhibits J and K?

A. Oh, yes, I signed them.

Q. Did you know what was in them when you signed them?

A. Certainly.

Q. Were they true?

A. I thought they were true; yes, sir, certainly.

Q. You stated there what you had done? Had you made those inquiries?

A. I stated in the first letter——

Q. No, do not recite it, because we do not want that for the jury; it is only here for some other purpose.

A. I do not say in either letter that I had consulted with the American Tobacco Company——

Q. If you had stated in there that you had done something, had you done something?

A. I certainly had.

Q. Were you at that time employed by—had you been employed or consulted by this defendant, the American Lithographic Company—as an attorney or counsel?

A. Not in the ordinary acceptation of the term.

132 By Mr. JENNER:

Q. In any acceptation?

A. I cannot tell whether I had been talked with by any of the officers about this suit or not at that time—I mean about this claim, it was not then a suit.

The COURT: Question allowed. Go on.

CHARLES EDDY resumes the stand:

(Book is handed to the Court.)

The COURT: This is the minute book, No. 1, is that it?

Mr. KNAUTH: Yes, minute book No. 1.

The COURT: Enter, Mr. Stenographer, and Clerk, that the witness Charles Eddy, secretary of the defendant, desiring to purge himself of contempt of Court, now appears in court and produces the book in question, American Lithographic Company, New York, Minutes No. 1, and hands the same to the Court, and the Court marks the same Exhibit L for identification on page 1, G. W. R., *U. S. J.* It is not in evidence, simply marked, so it may be referred to. Keep it in your custody and enter an order that the witness having purged himself of contempt that he is discharged from the custody of the marshal with a warning not to get caught in any way again.

Mr. JENNER: I desire to enter the defendant's protest and objection against the marking.

Adjourned to Thursday, November 8, 1906, at 11 o'clock a. m.

133 NEW YORK, *November* 8, 1906.

JUNIUS PARKER resumes the stand.

By Mr. KNAUTH:

Q. Now, Mr. Parker, will you please state whether previous to April 23, 1902, you had any communications with the American

Lithographic Company with reference to these posters like Exhibit G for identification?

A. I do not recall unless my letter indicates, Mr. Knauth.

Q. Will you look at the letter and see whether it refreshes your recollection with reference thereto?

A. I did have communication directly and indirectly with the American Lithographic Company before that letter was signed, that is, before April 25, 1902. I do not remember with whom I had any such communications. I do not remember anything about them except as indicated by that letter. I do not recall, on or about the 25th of April, 1902, seeing any such pictures like Exhibit G for identification. I have seen that picture, but I do not recall under what circumstances I saw it, nor whether it was about the time that letter was written or before. I recall a call of the Marshal in reference to this matter; I do not recall the date.

Q. Now, will you tell us what happened when the Marshal called at your office with relation to these pictures or posters?

Mr. JENNER: I object upon the ground that it is incompetent and irrelevant as against this defendant.

Mr. KNAUTH: Of course, I propose to connect it with the defendant hereafter.

The COURT: I will hear it. The case you see is coming here piecemeal, a little here and a little there, and they may connect it and they may not, I do not know; I can see how it might be material if connected, and I can see if not connected it will be
134 immaterial, so I do not see how I can do otherwise than receive it. It comes to an order of proof. I do not see how I can obviate that, so I will overrule the objection and give you an exception.

Exception by defendant.

A. My recollection is not distinct nor detailed about that. I recall that Mr. Shrenk, a gentleman from your office, and a marshal, came to my office with some legal papers. I recall that I knew it was about this matter, and that I told them if there were any such pictures—I am giving my best recollection—I told them if there were any such pictures they were in a certain office on another floor than mine. I recollect, too, their coming back to my office, as I assume after they had executed—after the marshal had executed the writ. That is my best recollection of what occurred and about the only thing I can recall. There was nothing particularly at the time to impress it on my mind.

Q. Do you remember that you gave any instructions to have an examination made of the number of such pictures in the possession of the American Tobacco Company?

A. I do not recall that, Mr. Knauth; I do not recall of my having seen Mr. Wilson or any one else connected with our company in respect to it, although I may have done so of course. I am attending here under subpœna.

Q. In the subpœna dated October 18, 1906, and addressed to you, and described as a certain statement made by the American Tobacco

Company and dated June 23, 1902, of the number of "Here's to Old English" hangers ordered by the American Tobacco Company from the American Lithographic Company, and their disposition? Have you brought that statement?

A. I have not brought it, because I had an investigation made from the files in my office and it could not be found. I heard the testimony of the witness yesterday that he handed me that statement. The paper marked for identification Plaintiff's Ex-
135 hibit I does not refresh my recollection on the subject (paper handed to witness). I still have no recollection of this statement having been handed to me. Of course I do not deny that it does.

Mr. JENNER: I move to strike out "Of course I do not deny that it does."

By the COURT:

Q. You do not deny what?

A. I do not deny that it was handed to me, and I say this paper does not refresh my memory.

Q. You do not recollect, in other words, that it was not handed to you?

A. I do not.

Q. But what you mean to say is you have no recollection that it was handed to you?

A. No, sir.

Motion denied. Exception by defendant.

By Mr. KNAUTH:

Q. You believe at the present time you would be unable to find the original of that statement if there was such an original?

A. If this original was handed to me and kept by me in my files I ought to be able to find it. The fact that I am unable to find it makes me believe it was not retained by me even if it was handed to me.

Q. What was the practice with reference to putting on the stamp in blue ink such as is shown by the exhibit for identification, Plaintiff's Exhibit I?

A. I do not believe there is any established practice, Mr. Knauth. Answering your question fully, I would say that I have noticed that some departments put such a stamp on the letters that come to them and some do not, depending on the fancy of the manager of the department.

Q. Now, what do you know as to the existence of any agreement between the American Tobacco Company and the American Lithographic Company with reference to posters of this kind like Exhibit G for identification?

136 Mr. JENNER: I object to that. If the witness knows anything about it, it is knowledge acquired in part as counsel for the defendant in this action, and the defendant does not release him from his professional obligation.

Objection overruled. Exception by defendant.

A. May I say to your Honor that knowledge I have of that came to me certainly in the relation I have as counsel for the American Tobacco Company, and am I not priviledged in respect to that?

By the COURT:

Q. You are the attorney for the American Tobacco Company?
A. Yes, sir; I am the attorney for the American Tobacco Company.
Q. You have charge there of their legal department and do their legal work?
A. In part.
Q. How?
A. In part.
Q. Are you at the head of it?
A. No, sir; I am not.
Q. You are merely a subordinate?
A. I am an assistant.
Q. An assistant?
A. Yes, sir.
Q. Who is it that has charge of that?
A. Mr. Fuller is the chief counsel for the American Tobacco Company—W. W. Fuller.
Q. Does he have his office there with the company?
A. Yes; our offices adjoin each other.
Q. He is the chief counsel?
A. Yes, sir.
Q. You act under him?
A. Yes.
Q. That is either under special instructions from time to time, or under a relation of a certain matter his instructions might be general?
A. Yes, sir.
Q. And you take care of that, leaving it to you entirely as you see fit to do?
A. Yes, sir.
Q. Then again he would give you special instructions to do a special thing, as I understand it?
A. Yes, sir.
Q. That is your relation. Now, Stenographer, kindly read me the question.

137 The question is read as follows: "Q. Now, what do you know as to the existence of any agreement between the American Tobacco Company and the American Lithographic Company to posters of this kind like Exhibit G for identification?"

Mr. JENNER: I think the witness also is privileged as counsel for the American Tobacco Company. The fact that there is a different counsel——

The COURT: That is the question raised now. He says he gained the information he had as counsel for the American Tobacco Company. Have I misunderstood you?

The WITNESS: No, I did not, your Honor.

Q. Now, while acting, you say that any information or knowledge that you had in relation to pictures of this description, or lithographs, advertisements, whatever they are, either of this character (indicating), whatever knowledge you had of them you received and gained while acting as counsel, assistant counsel or attorney, for the American Tobacco Company, and in your capacity as such?

Mr. KNAUTH: I beg your Honor to consider that the transaction was a transaction between the witness' company and some other company; that there was at that time no litigation in progress, that there was no communication between him and his client of which we know, but that apparently he was acting for his client with some other company, and it seems to me the professional relations do not come into work at all in a controversy of that kind. It would be very different if we tried to ferret out some communication which had been made to him by his client, but that is not the situation. It seems to me that it does not call for anything of that kind.

Mr. JENNER: I submit that the fact that there may have been no litigation pending at the time is immaterial. Privilege exists, nevertheless. The question is general, and asks for his knowledge
138 of the entire matter. I also raise my objection on the fact that he still has professional relations with the defendant in this case.

The COURT: Does it appear here that he has gained this knowledge because of this relation of attorney and client?

Mr. JENNER: Does your Honor ask does it appear so?

The COURT: Yes.

Mr. JENNER: I understand it has appeared so.

Mr. KNAUTH: I do not understand that at all. I think it would be very proper to question the witness more fully with reference to the matter.

The COURT: I think that is so.

Mr. KNAUTH: We do not intend to pry into any secrets between him and his client.

The COURT: No, and I should not permit that, confidential communications between the attorney. I do not think any court has gone so far as to hold that confidential communications between corporations and their counsel can be inquired into and brought out in Court; but in order to relieve an attorney from telling what he knows, it appears that his knowledge and information was gained in that way because of that relation, through it, that is, that it would be of that nature.

Mr. JENNER: I understand the rule to cover knowledge or information obtained in the course of his professional employment for the client. It is not confined to communications between the client and counsel. It is information obtained by the counsel.

The COURT: And because of that confidential relation. You can hardly claim, I think, that if you had a client for whom you were even acting generally, that if you should see him walking along the street with his hands full of jewelry and you heard him say to some

partner in crime "I just took these from the house of a certain person, and you take them and run away with them and hide them." and the other person took them and went away with them, disappeared, and it should turn out a robbery had been com-
139 mitted at that house, that you could decline in court to testify on an indictment against him that you gained that knowledge in the course of your professional employment. On the other hand if he came to you for advice as counsel, then, in order to get your counsel and advice as to how to get out of the scrape, that would be a conversation. I think that illustrates this case, so, whether it comes under the one head or the other, the counsel may inquire so the Court can rule intelligently. I do not think it sufficiently appears at the present time, so he can ask so I can determine that question intelligently.

Mr. JENNER: The witness has stated that he acquired this knowledge as attorney for the American Tobacco Company. I so understand the witness to have stated.

The COURT: He does not state, he has not stated it was communicated to him; he does not state who communicated any knowledge he had. He can tell what the information was if he had any. He may find out just how and when he got it, so I can see.

Mr. JENNER: I also call your Honor's attention to the expressions which have often been used that the rule is to be liberally construed in favor of the privilege.

The COURT: Oh, the Court should always protect counsel and client. There is the liberty in our form of government; there can be communications between attorney and client, if the principal seeks counsel and his advice, has a right to employ an attorney and confide in him as such certain things, and all the communications were absolutely privileged, it is the duty of the Court to see to it that the rule is strictly abided by in the Court, and I will try to do it in this case; but he may find out whether it does or does not come within that rule.

By Mr. KNAUTH:

Q. Now before telling us the substance of any arrangement that was made, will you tell us how you came to take part in any
140 communication with the American Lithographic Company with reference to that matter?

Mr. JENNER: I object to that on the same ground.

The COURT: I think he may state that. Get right to the nub of the transaction.

Exception by defendant.

A. In respect to this I can only state that it is according to my best recollection, perhaps aided by my knowledge of the general conduct of the business, that if there exists any contract such as indemnity, or otherwise, it was called to my attention by the officials or employees of the American Tobacco Company, when I was first spoken to about the matter. I should say also that if there exists any later agreement made after the contract for the pictures were entered into——

Mr. JENNER: If there was a contract.

A. (Continued.) If there exists such my knowledge of that arises from the fact that it was shown to me by officers or employees of the American Tobacco Company while they were conferring with me as to their proper course.

Q. Was this matter in the hands of the general or chief counsel, Mr. Fuller, or was it in your hands?

Mr. JENNER: I object to that on the same grounds.
The COURT: You mean who had charge of it?
Mr. KNAUTH: Yes.
The COURT: What matters do you mean?
Mr. KNAUTH: The matters to which he has just testified.
The COURT: The matter of any contract or agreement that was entered into between the American Lithographic Company and the American Tobacco Company, is that it?
Mr. KNAUTH: Yes.
The COURT: You want to know who had charge?
Mr. KNAUTH: That is the object.
141 The COURT: Of that matter of arranging and advising about it?
Mr. KNAUTH: Yes, sir.
The COURT: Tell us, Mr. Parker.
Exception by defendant.

A. It was in my hands, I think, and perhaps Mr. Fuller had no personal knowledge of it. It was subject, of course, to his supervision and control.

By the COURT:

Q. Put in your hands by whom? Who put it in your hands?

Mr. JENNER: Same objection.
Objection overruled. Exception by defendant.

A. I think it really came from the plaintiff or from a representative of the plaintiff. My recollection, refreshed by those letters, is the first I ever heard of them at all was in 1901——

Mr. JENNER: That I object to. The witness is not responsive to the question.
The COURT: I do not think it is hardly.

By the COURT:

Q. What I asked you, Mr. Parker, was this: Now, see if I understand, so as not to get confused. Counsel for the plaintiff here rather assumes by his question, and you by your answer assume, that the question did come up of an indemnity agreement in relation to this lithograph Exhibit G. If I get the exhibits wrong or anything of that sort, correct me—that some such question came up, either that it should be executed and made or that it had been executed or made, the one or the other; perhaps it involved both. Now, it is assumed, and your answer assumes, that you did have some knowledge of, and

142 gained some knowledge at a time when you were assistant counsel for the American Tobacco Company of that agreement or of negotiations for such an agreement. Now, then, assuming that to be true, the question is who put that matter into your hands, that is, who brought it to your attention and investigation?

Mr. JENNER: Will your Honor allow me an objection to your statement of the purport of the evidence? It seems to me it is not quite justified by the evidence.

The COURT: I have not got the evidence yet about it. The question rather assumes that condition of things, and his answer seems to assume if he did have any such knowledge or information, whatever he got was when he was counsel for the American Tobacco Company.

Mr. JENNER: Will your Honor allow me to object and take an exception?

By the COURT:

Q. Now, did you get that information, any that you had—you need not state what it was—but any that you had, from whom did you get it; was it from the American Tobacco Company, your superior, or was it as president I take it—what are the officers?

Mr. KNAUTH: President, yes.

Q. There was secretary, treasurer and Board of Directors?

A. Yes, sir.

Q. Now, did you get it from them or through them, or did you get it from the American Lithographic Company or some of its agents or representatives, or did you get it from the plaintiff in this action, Emil Wereckmeister, or some of its agents or representatives, or attorneys, or some other person? Now, that question you may answer.

Mr. JENNER: Same objection.

Objection overruled. Exception by defendant.

143 A. I believe I got it all from the American Tobacco Company or some of its officers or employees. The original source of information was Mr. Wilson.

Mr. JENNER: I move to strike out "the original source of information, &c."

Motion denied. Exception by defendant.

Mr. JENNER: Also as not responsive.

Motion denied. Exception by defendant.

The COURT: Now, the information which he did have and did gain, because afterwards he may have called in other people; but he may now state whether he gained this information from Mr. Wilson, did you say?

The WITNESS: I said my inquiry must have begun with Mr. Wilson.

Q. He was an employee of the Tobacco Company, wasn't he?

A. Yes, sir, he was at the time.

Q. Whether you gained this information, such as you did gain, state whether or not you gained it in the course of your employment as attorney for the American Tobacco Company, and when or where you were active as legal adviser to and for that company?

A. Yes, it was in my capacity as counsel for the American Tobacco Company and while I was acting for it.

Q. And was it or was it not for the purpose of giving advice and counsel to that company?

A. It was.

The COURT: You may cross-examine him thoroughly on the subject and see; that is, you may conduct an examination in the nature of a cross-examination first.

By Mr. KNAUTH:

Q. Did you also get your instructions as to how to act in the matter from the American Tobacco Company, that is, from its officers or its directors?

144 Mr. JENNER: I object to that on the same grounds, and also that it is immaterial whether he was instructed or whether he acted upon his own responsibility as counsel.

The COURT: Yes, he may answer. I will overrule the objection and give you an exception.

Exception by defendant.

A. Yes. No peremptory instructions, but my course was attendant upon a conference with the officers or directors of the American Tobacco Company.

Q. I suppose whatever you did in the matter you were either authorized directly to do or you were generally authorized by the general authority given to you to deal with the matter?

A. I suppose so.

Q. Is that your recollection of the circumstances?

A. I suppose that I had authority to deal generally with the matter. It is not a matter of recollection. I mean now I suppose my general authority covered it.

Q. And whatever you did in the matter you did in acting under the authority as you believed it to exist?

A. Yes.

Q. Now then, when you wrote the letter, Plaintiff's Exhibit J, was that a letter written under such general authority of your company (handing paper to witness)?

A. Yes.

Q. And when you wrote the letter, Plaintiff's Exhibit K, was that written under such general authority (handing paper to witness)?

A. Yes.

Mr. KNAUTH: Now, if it please your Honor, without disclosing to the jury the contents of the letter, Plaintiff's Exhibit K, I claim by this letter, as well as by the previous letter, Plaintiff's Exhibit J,

the privilege which is now claimed of a privileged communication was waived (handing letters to Court).

145 Mr. JENNER: I object to that because it is impossible for counsel to waive privilege. It is for the client to waive privilege.

Mr. KNAUTH: The client has waived it under his testimony.

The COURT: What does the evidence here show the Berlin Photographic Company was?

Mr. KNAUTH: That is the firm of the plaintiff.

The COURT: That is the plaintiff?

Mr. KNAUTH: Yes.

The COURT: So this really was a letter to the plaintiff?

Mr. KNAUTH: Yes. I beg to submit to your Honor in this connection that here under the testimony of the witness there was the fullest and frankest disclosure made by this company through its agent or attorney for the plaintiff, and thereby a situation was created by which it would be impossible either for the company or for the witness to claim the privilege of not disclosing the same things to the plaintiff or to anybody else in court as protected by the privileged nature of the communication. After all, the whole principle of protection lies in the absolute secrecy which the counsel is bound to keep with reference to matters of confidence which his client has reposed in him. This is the extent of the protection—as soon as we go into a controversy which is not treated secretly between them, why, the whole sense of the protection and the doctrine of protection falls to the ground, and I say here we have in these letters such a full and frank disclosure of the actual circumstances that it is apparent from a reading of these letters that at that time neither client nor the lawyer ever intended to have these transactions kept secret, but on the contrary they divulged them fully to the other side that was interested in the matter.

The COURT: Now, take the letter here—take this one of April 25th, I do not see any reason—"I wrote you that I would not authorize the distribution," and so and so; "I am now informed by the American Lithographic Company" so and so. Now, you

146 may ask him—and he cannot shield himself under a question of privilege—you may ask him all about it, whether or not he was so advised or informed that the American Lithographic Company or by anybody connected with it, whoever they were, whether he was advised as stated in this letter. That is the second paragraph, Mr. Stenographer, of this letter. That part I rule. Now, in regard to the third paragraph commencing, "This being the case," you may ask whether or not the American Lithographic Company did or did not agree as therein stated in reference to this picture, and you may ask him whether that was an oral agreement or a written agreement, and where it is.

Mr. JENNER: I object to your Honor's ruling.

The COURT: Yes, and take an exception. It is overruled and you can take an exception.

Exception by defendant.

Mr. JENNER: My difficulty will be my objection won't be any

good unless I state the grounds. The grounds now differ somewhat from the preceding objections. The ground is if the action were against the American Tobacco Company, then the witness, Mr. Parker, would or would not be presumed to have had authority to write the letter to the plaintiff, depending upon the circumstances of the case, but his authority to write the letter is not material or relevant to any issue here, and that the questions which your Honor suggests are, therefore, incompetent, because they come within the privilege of the party for whom Mr. Parker was acting as counsel; and in the next place he is not shown to have been competent to say whether there was any agreement such as is suggested under your Honor's ruling or not, and unless he is shown to have been competent, he cannot testify on that matter; and I further object on the ground that such a question as your Honor rules to be ad-
147 missible calls for the witness' conclusion, and not facts. Therefore, on the grounds just stated and on the preceding grounds made this morning, I base my objections to the question.

The COURT: The objections are overruled and I will give you an exception.

Exception by defendant.

Q. Now, will you state to us whether at the time when you wrote this sentence on April 25, 1902, "I am now informed by the American Lithographic Company," &c., as contained in this letter, you had or had had any communication with or from the American Lithographic Company?

Mr. JENNER: I object on the same grounds as last stated.

Objection overruled. Exception by defendant.

A. I have no recollection as to how the communication reached me.

By the COURT:

Q. Now, Mr. Parker, read that. You say there a certain thing. Is that or not true?

A. It is true that I got that assurance from the American Lithographic Company, but whether I got it by direct communications through them or brought to me through Mr. Wilson, and whether it was confirmed by things I had seen the American Lithographic Company sign I cannot say.

Mr. JENNER: I move to strike out the answer as incompetent.

Motion denied. Exception by defendant.

Q. You got that information, but whether you received it through Mr. Wilson, who was an officer—what officer was he in your company?

A. He was not an officer; he was an employee, a brand manager.

148 Q. Oh, yes, that is right—whether you got it through an employee, Mr. Wilson, of the American Tobacco Company, who purported to bring it from the American Lithographic Company, or whether you received it by communication, oral or

written, from some officer or director or agent of the American Lithographic Company, you cannot tell; is that just what you mean?

Mr. JENNER: I object to the question on the same ground.
Objection overruled. Exception by defendant.

A. That is what I mean.
Q. And do you mean to say that you have no recollection on that subject?
A. I have no recollection on that subject.

By Mr. KNAUTH:

Q. Will you tell us next, what, if anything, you know about an agreement between the two companies mentioned in the third paragraph of the letter?

Mr. JENNER: I object to that on the same grounds I have stated in respect to competency and privilege.
Objection overruled. Exception by defendant.
The COURT: Let me take the letter and see if I can get at it (letter handed to Court).
Mr. KNAUTH: It is the last paragraph.

By the COURT:

Q. This being the case and—now read the rest of it. Regard it as read. Of course there might be some phases in this controversy where some questions might come up where it would be better not to have the jury hear it, and I do not want to take time to send the jury out. Now, Mr. Stenographer, you can copy into
149 the question the rest of it, "This being the case and the American Lithographic Company agreeing to hold us free from all damages, I have advised our company that it may circulate the picture and I apprehend that it will do so." Was any such agreement as that made to your knowledge?

Mr. JENNER: I make an objection to that on the same ground already stated.
Objection overruled. Exception by defendant.

A. Your Honor is holding that I must answer it, although I got the information from an officer of the American Tobacco Company?
Q. Oh, yes.
A. According to my recollection there was.
Q. Was it in writing or an oral agreement?
A. According to my recollection it was a written agreement, but either in the form of a formal agreement or a letter.
Q. But it was something in writing, it could be either way?
A. Yes.
Q. Did you or did you not see that written paper, typewritten, or whatever it was, did you or did you not see it?
A. Your Honor, I have no recollection of having seen it and it is very difficult to separate my recollection from my knowledge of what

occurred in the course of business. I have no recollection of having seen any such letter or agreement.

Q. Or writing?

A. Or writing, after it was executed. I have a recollection——

Q. Did you see one before it?

A. I have a recollection of having seen such a letter or paper, although I cannot at all state its contents or what it was.

Q. Never mind that.

A. And I do not know whether that resulted——

Q. Before it was executed do you mean to say?

A. I am not sure, before or after; and I do not recall
150 whether that resulted from my having written it and turned it over to Mr. Wilson to have it signed, or from my having seen it after it was signed.

Mr. JENNER: I move to strike out what the witness says, that there was such an agreement; there is no foundation for it.

Motion denied. Exception by defendant.

Q. Your recollection is that you saw such a paper which had been drawn by somebody either before or after its execution?

A. You mean I saw it before or after its execution?

Q. Yes, one or the other.

A. Yes.

Q. You cannot remember?

A. No.

Q. But your recollection is you saw such a paper. You cannot say it was then executed when you saw it, it may not have been executed, but you saw such a paper?

A. Yes.

The COURT: I refuse to strike it out. I deny the motion and give you an exception. You move to strike out each and every part of it.

Mr. JENNER: I do move to strike out all of it, each and every part of it.

Motion denied. Exception by defendant.

By Mr. KNAUTH:

Q. Did you not testify at the previous trial of this case that you had had correspondence with the American Lithographic Company with reference to this picture of which Exhibit G is a copy?

A. Yes.

Mr. KNAUTH: I think I may be permitted to show the witness his former testimony to refresh his recollection.

The COURT: Why don't you ask him whether he did or not?

Mr. KNAUTH: I asked that question first.

The WITNESS: I did have such correspondence, and did so testify.

Q. Can you produce that correspondence? Have you got it here?

A. I have the correspondence here, yes; I have what I have
151 been able to find in my pocket. Your Honor has ruled——

By the COURT:

Q. You were subpœnaed to bring it with you?

A. Yes, sir.

Q. And you come here under this subpœna from the plaintiff and you have obeyed that subpœna so far as to bring that correspondence, such as you find?

A. Yes, sir. I have brought the few letters I have received from the American Lithographic Company. I have not brought with me, thinking I could furnish hereafter, if desirable, the copies of letters, as they are scattered through the letter-book. It appears I wrote more letters than I received from them.

By Mr. KNAUTH:

Q. Will you first produce what you have so we can see what it is?

A. Your Honor has ruled that I must produce these? I have no privilege that I need not produce them?

The COURT: I have not ruled that yet. You have brought them to court.

The WITNESS: Yes, sir.

The COURT: And you have them in your possession as a witness on the stand?

The WITNESS: Yes, sir.

The COURT: And you have done that in obedience to the subpœna thus far?

The WITNESS: Yes, sir.

The COURT: And now you desire to make your claim. You can raise the question and I will then rule.

The WITNESS: I do. I desire to raise the question of the privilege in not producing them.

Mr. JENNER: I desire to ask the witness a question or two in regard to his relations to us.

The COURT: Certainly.

152 By Mr. JENNER:

Q. On the former trial you testified that in conversation over the telephone it was understood that the American Tobacco Company and the American Lithographic Company would co-operate in any suit which was brought, did you not?

A. Yes, sir.

Q. Was that a fact?

A. Yes, sir.

Q. You also testified that you had not been formally retained by the American Lithographic Company, but you felt your relations were somewhat in the nature of counsel for the American Lithographic Company, because it was understood that there should be the fullest co-operation, and you would feel that you should not disclose the contents of that correspondence because of there being a *quasi* relation as attorney at least in respect to this matter. Was that the fact?

A. That was the fact.

Q. What you then stated was true?
A. It was.
Q. And you have consulted with me in respect to the defenses of this suit and in defense of the suit against the American Tobacco Company?
A. Yes.

By Mr. KNAUTH:

Q. You also stated in the same connection as follows: "I am not under any retainer by the American Tobacco Company. I have not entered into any relation as their counsel"?
A. I think I so stated.
Q. And that was true?
A. That was true; yes.

By Mr. JENNER:

Q. Did you mean by that that the American Lithographic Company had not paid you any money?
A. Yes, and that I expected them to pay me no money.
Q. That is all you did mean by it?
A. Yes.

Mr. JENNER: I claim that the witness is privileged, and that the defendant has a right to have its correspondence protected.

153 The COURT: Of course I do not know what you want with this correspondence. If it simply relates to this matter, this question, referred to in that letter, then that part of the correspondence I will rule—I am not ruling that it proves anything, but I rule that the witness should produce it, and then the letters can be offered, and I will look at them and see whether they are competent evidence and prove anything, not to be made public property here. If they bear on the rights of the parties to this controversy here.

Exception by defendant.

Mr. JENNER: That does not include letters written to me?

The COURT: They are not to be used publicly unless it is competent evidence in a particular case, either proves or tends to prove something that is material.

The WITNESS: If your Honor please, I have very few letters written to me or to my department by the American Lithographic Company at all, or, at least, that have been retained for any time until the year 1906, the spring of that year. It would seem to me that these last letters stand on a different footing than those you have spoken of.

The COURT: You may take this, stenographer, July 7, 1902, January 16, 1905——

The WITNESS: That is a copy of a letter that was enclosed. This is the letter which was enclosed in that letter to me (indicating).

The COURT: Let me see that letter I was ruling in regard to (letter handed to Court). That letter is April 25, 1902, the letter of July 7, 1902, January 16, 1905, January 12, 1905. These are all long subsequent to this?

The WITNESS: I found no letters.

The COURT: Those are all subsequent to that. My ruling was that he might produce and should produce here any letter.

154 My recollection is he was to produce any communication from the American Lithographic Company in relation to an agreement between the American Tobacco Company and the American Lithographic Company holding the company harmless from damages in regard to this picture; that is the sum and substance of it.

The WITNESS: This is the only letter that could have any possible bearing on it. These others are long subsequent to it. That is the only letter that could have any possible bearing on it, as limited by your Honor (indicating letter).

The COURT: Let me see that letter (letter handed to Court). Under your protest I give the defendant here an objection to it on all the grounds heretofore stated, and an exception.

Exception by defendant.

Mr. JENNER: I object to your Honor showing the letter to plaintiff's counsel.

The COURT: They may see it because I have ruled on it. These others are letters written under seal.

By the COURT:

Q. Mr. Donaldson is the Vice-President of the American Lithographic Company, is he?

A. I so understand, yes.

Q. Did you receive this letter of July 7, 1902, in the ordinary course of mail (handing paper to witness)?

A. I have no doubt I did, but I have no recollection of it.

Mr. KNAUTH: Will you admit that that is the handwriting of Mr. Donaldson (exhibiting paper to Mr. Jenner)?

Mr. JENNER: Yes.

Mr. KNAUTH: Offers in evidence letter of July 7, 1902, which is as follows:

Mr. JENNER: I object to it on the ground that it is irrelevant to any issue in this case, and also incompetent.

Mr. KNAUTH: I want to state in this connection that I

155 intend to prove something else by this letter than what I have disclosed heretofore.

The COURT: You can have it for what it is worth.

Exception by defendant.

Marked Plaintiff's Exhibit O, and the following is a copy thereof:

"Sales Department,
American Lithographic Company,
19th Street and Fourth Avenue,
New York.

JULY 7TH, 1902.

"Mr. Junius Parker, Law Department, American Tobacco Company, 111 Fifth Avenue, N. Y.

"DEAR SIR: Your favor of the 2nd inst., enclosing a summons

against the American Tobacco Company in the suit of Emil Werckmeister received.

It is understood that our counsel is to appear for your company in this matter as well as for ourselves, and without any claim to compensation from you.

Yours very truly,

ROBERT M. DONALDSON,
Vice-President."

Q. You are acquainted with the action which was commenced about that time by Emil Werckmeister, this plaintiff, against your company, in this court?

A. Yes, I know of it.

Q. And you know that that action was defended by Messrs. Wetmore & Jenner, acting as the defendant's attorneys therein.

A. Yes.

Mr. KNAUTH: I offer in evidence a certified copy of the summons, amended complaint, answer, minutes of trial, bill of costs, and judgment in the action of this plaintiff, Emil Werckmeister,
156 against the American Tobacco Company, in this court, the summons being dated June 20, 1902, and the judgment being entered on December 5, 1904.

Mr. JENNER: I object to it. It is incompetent against the defendant in this case, irrelevant to any issue in the case, and immaterial.

The COURT: I will overrule the objection and receive the evidence, and I will determine what it establishes, if anything.

By the COURT:

Q. Do you know, Mr. Parker, who the counsel of the American Lithographic Company was? Do you know now whether you knew them or not; do you know now?

A. Who represented the American Lithographic Company in this action?

Q. Yes, who was their counsel?

A. Yes, Mr. Jenner of the firm of Wetmore & Jenner. He did appear for the American Tobacco Company in that suit.

By Mr. JENNER:

Q. Were you also associated with him in the defense of the suit?

A. I was associated with Mr. Jenner in the way of having conferences with him and aiding him in any way I could; it was not very substantial.

Mr. KNAUTH: Now I offer that record in evidence, the summons, complaint, answer and judgment in the action.

The COURT: I will receive it and give them an exception and see what it amounts to hereafter.

Exception by defendant.

Marked Plaintiff's Exhibit P, and the following is a copy thereof:

157 "United States Circuit Court, Southern District of New York.

Action No. 1. (Replevin.)

EMIL WERCKMEISTER
against
AMERICAN TOBACCO COMPANY.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the Borough of Manhattan, in the City of New York, this 20th day of June, in the year one thousand nine hundred and two.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

BRIESEN & KNAUTH,
Plaintiff's Attorneys.

Office & Post Office address, 49 Wall street, Borough of Manhattan, New York City."

158 Circuit Court of the United States for the Southern District of New York.

No. 1.

EMIL WERCKMEISTER, Plaintiff,
against
AMERICAN TOBACCO COMPANY, Defendant.

"The amended complaint of the above named plaintiff against the above named defendant, respectfully shows to this Court, upon information and belief:

"First. That said plaintiff during the times hereinafter stated was and is a citizen of the German Empire, doing business at the City of Berlin, in Germany, under the trade name of 'Photographische Gesellschaft,' and at the City of New York in the United States under the name of the 'Berlin Photographic Company.'

"Second. That said defendant is a corporation duly incorporated under the laws of the State of New Jersey, and having a place of business in the Borough of Manhattan, in the County and State of New York, in the Southern District of New York.

"Third. That shortly previous to the second day of April, 1894, one W. Dendy Sadler, a British subject, invented, designed and

painted a certain painting called 'Chorus,' said painting showing a group of gentlemen sitting and standing around a punch bowl and holding pipes and filled glasses in their hands and sing-
159 ing in chorus, and said painting by reason of its artistic grouping, its excellent drawing of the figures and faces, and the skillful execution is a piece of art of very great merit and value.

"Fourth. That the said W. Dendy Sadler, on or about the second day of April, 1894, by an instrument in writing, executed and delivered on the said day, and previous to any publication of said painting in any manner or form, assigned, transferred and sold to said plaintiff for a valuable consideration, all his right, title and interest in any copyright obtainable thereon in the United States of America, and in all other countries, and the sole liberty and right of printing and reprinting, publishing, completing, copying, executing, finishing and vending said painting.

"Fifth. That having acquired the right to obtain such copyright for said painting, and being a subject of the Emperor of Germany, and desiring to secure the copyright thereof under the laws of the United States of America respecting copyrights, and the sole right of printing and reprinting, publishing, completing, copying, executing, finishing and vending the same, said plaintiff, before the publication thereof in this or any foreign country, to wit, on the sixteenth of April, 1894, delivered to the Librarian of Congress at his office at Washington, District of Columbia, a description of said painting, to wit, 'Chorus'—W. Dendy Sadler, 'A company of gentlemen, with filled glasses, singing in chorus' and also a photograph thereof, and at the same time said plaintiff paid to the said Librarian of Congress the sum of one dollar ($1.00) for recording said description, and thereupon said Librarian of Congress duly received the same and recorded said description of said painting on the sixteenth day of April, 1894.

"Sixth. That thereafter, on or about the first day of June, 1894, and not before, said plaintiff began the publication of said painting in this country and in foreign countries, by the sale of copies thereof.

160 "Seventh. That by reason of the premises and the statutes in such cases made and provided there was secured to said plaintiff, his executors, administrators and assigns, or intended so to be, for the term of twenty-eight (28) years from said sixteenth day of April, 1894, the sole liberty of printing and re-printing, publishing, completing, copying, executing, finishing and vending the said painting 'Chorus'?

"Eighth. That said plaintiff has duly given notice of his copyright as is required by law, by inscribing upon a visible portion of every copy of said painting published by him, or of the substance on which the same were mounted, the word 'Copyright,' together with the year the copyright was entered, and the name of the party by whom it was taken out thus: 'Copyright, 1894, by Photographische Gesellschaft.'

"Ninth. That at the time of the commencement of this action said defendant was and still is in the possession at its offices No. 111 Fifth

avenue, New York City, and at its factory building and in the hands of its various agents, officers and employees in said city, and in said State, of 7,338 sheets, each containing a copy of said copyrighted painting prepared in violation of plaintiff's copyright wrongfully and without the consent of said plaintiff, the proprietor of said copyright first obtained in writing signed in the presence of two witnesses; that said defendant caused said copies to be printed for it by the American Lithographic Company and upon delivery thereof to defendant, *published some* of said sheets in the City of New York and elsewhere in the United States of America; that said unlawful printing and publication of said copies in defendant's possession was done before the commencement of this action, and within one year previous thereto, and during the existence of said copyright, and

161 that 203 of said copies in the defendant's possession as aforesaid, were at the commencement of this action, seized by the Marshal of this Court under a writ of replevin duly issued out of this court, and are now in the hands of said Marshal or of the Clerk of the Court in pursuance to said writ duly executed.

"That nine hundred and ninety-three (993) of said copies in defendant's possession at the place of business of the Deuther Manufacturing Company in the City of Buffalo, New York, were, after the commencement of this action, seized by the United States Marshal for the Western District of New York, under a writ of replevin duly issued out of this court, and are now in the hands of said Marshal in pursuance to said writ duly executed.

"Tenth. That by virtue of the statutes of the United States, every one of said copies of said painting found in the possession of said defendant as aforesaid, or which may hereafter be found in its possession, has become and will be forfeited to said plaintiff, and is, and they now are his property.

"Eleventh. That the same are wrongfully detained by said defendant.

"Wherefore, said plaintiff demands judgment against said defendant for the delivery to him, said plaintiff, of all said copies of said painting, 'Chorus,' made in violation of said plaintiff's copyright thereon, and found in the possession of said defendant, and of all such further copies made in violation of plaintiff's said copyright, as may be found in said defendant's possession previous to the trial of this action, together with the costs of this action.

BREISEN & KNAUTH,
Plaintiff's Attorneys, No. 49 Wall Street, New York City.

162 "Southern District of New York,
State of New York, County of New York:

"Antonio Knauth, being duly sworn, deposes and says:

That he is one of the attorneys for the plaintiff in the foregoing amended complaint; that he has read said amended complaint, and knows the contents thereof; and that the same is true, except only the allegations therein stated to be on information and belief, and that

as to those allegations he believes it to be true. Deponent further says that the reason why this verification is not made by said plaintiff is that said plaintiff is not in this country, but it a resident of Berlin in the Empire of Germany, and not at present in this country, and capable of making this affidavit; and that the sources of deponent's information, and the ground of his belief concerning the matters stated to be alleged on information and belief in said amended complaint, are the possession of the certificate of the copyright referred to in said complaint issued by the Librarian of Congress, correspondence and personal interviews with the plaintiff, correspondence with the defendant and its attorneys, and the personal examination of the defendant's infringing picture.

ANTONIO KNAUTH.

Sworn to before me this 21st day of December, 1903.
[SEAL.]
OTTO V. SCHRENK,
Notary Public, N. Y. County.

163 "United States Circuit Court, Southern District of New York.

EMIL WERCKMEISTER, Plaintiff,
vs.
AMERICAN TOBACCO COMPANY, Defendant.

The above named defendant answers the amended complaint of the plaintiff and for answer says:

1. This defendant has no knowledge or information sufficient to form a belief as to any of the matters set forth in the amended complaint of the plaintiff, excepting that—

"This defendant admits that it is a corporation duly incorporated under the laws of the State of New Jersey and that it has a place of business in the Borough of Manhattan, in the County and State of New York and Southern District of New York, and excepting that—

"This defendant admits that on or about the 26th day of June the defendant had certain lithographed copies of a picture which has been made for the defendant by the American Lithographic Company, and which this defendant now understands and believes is claimed by the plaintiff herein to be an infringement of the alleged copyright mentioned in the amended complaint herein, but how many of such pictures were in the possession of the defendant or its employees this defendant has no knowledge or information sufficient to form a belief and therefore the defendant denies
164 the allegations contained in the amended complaint in that behalf, excepting that—

"This defendant is informed and believes that certain copies of the said picture were on or about the 26th day of June, 1902, and at the instance and by the procurement of the plaintiff, seized by the Marshal of this Court and were carried away by him, and that the number of copies of said picture so seized and carried away by said Marshal was one hundred and thirteen, and excepting that—

"This defendant denies the allegations contained in the tenth and eleventh paragraphs of the amended complaint.

"For a further and separate defense referring to the denials, admissions and allegations hereinbefore contained material to this separate defense, with the same force and effect as if the same were here at length repeated, this defendant alleges:

"II. Upon information and belief that if any such copyright was obtained by the plaintiff as is set forth in the amended complaint herein, which, however, the defendant does not admit but denies as aforesaid, the same was and is void for the reason that the plaintiff, at the time of taking out said copyright, was not and never had or has been either the author, inventor, designer or proprietor of the said painting 'Chorus' alleged in the amended complaint herein to have been copyrighted, nor the assignee of the author, inventor, designer or proprietor thereof and had no right or authority under the statute relating to copyrights to take out or obtain any copyright thereon.

"For a further and separate defense to the cause of action set forth in the amended complaint, this defendant referring to the denials, admissions and allegations hereinbefore contained material to this separate defense, with the same force and effect as
165 if the same were here at length repeated, alleges upon information and belief as follows:

"III. That if any such copyright was obtained by the plaintiff as is set forth in the amended complaint, herein, which, however, this defendant does not admit but denies as aforesaid, the same was and is void and was abandoned to the public and the plaintiff had and has no right to maintain any action thereon for the reason that the said painting 'Chorus' alleged in the amended complaint to have been copyrighted was publicly exhibited by the author and proprietor thereof at the exhibition of the Royal Academy of Arts held in the City of London, England, from the first Monday of May in the year 1894, to the first Monday of August in the same year, both days inclusive, and continuously during said period, and was during the whole of said period exhibited to the public and published and that there was not at any time during that said exhibition, nor before, nor at any time since, any notice of the said copyright inscribed upon some visible portion of the said painting or on the substance on which the same was mounted, as required by the statute, in such case made and provided, and that such exhibition and publication was with the knowledge, consent and permission of the plaintiff and the said Sadler, the author and proprietor of the said painting.

"Wherefore, the defendant demands judgment that the amended complaint be dismissed with costs, that the plaintiff be required to return the copies of said picture so seized by the Marshal of this Court, or the value thereof, and that the defendant have judgment against the plaintiff by reason of the damages caused by the taking and detention thereof.

"WETMORE & JENNER,
Defendant's Attorneys.

34 Pine Street, Borough of Manhattan, N. Y. City.

166 UNITED STATES OF AMERICA,
Southern District of New York, ss:

"Percival S. Hill, being duly sworn, deposes and says:

"That the foregoing answer is true of my own knowledge excepting the matters therein stated to be alleged upon information and belief and as to those matters I believe it to be true. That the reason why this verification is not made by the defendant is that the defendant is a corporation, that I am the 1st Vice Pres't. thereof, that my information has been derived from employees of the defendant and from officers and employees of the American Lithographic Company having knowledge or information on the matters set forth in the answer, and the statements made to me by such persons are the grounds of my belief.

PERCIVAL S. HILL.

"Sworn to and subscribed before me this 22d day of July, 1903.

JOHN J. O'KEEFE,
Notary Public in and for the County of New York.

"Circuit Court of the United States for the Southern District of New York.

EMIL WERCKMEISTER, Plaintiff,
vs.
AMERICAN TOBACCO COMPANY, Defendant.

"The above named plaintiff replying to the further and separate defense set out in paragraphs marked 'II.' and 'III.' in the
167 answer to the amended complaint herein respectfully shows to the Court, upon information and belief:

"First. He denies each and every allegation contained in said paragraph marked 'II.' of said answer.

"Second. He denies each and every allegation contained in said paragraph marked 'III.' of said answer.

BRIESEN & KNAUTH,
Attorneys for Plaintiff.

49 Wall Street, New York City.

"SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

"Antonio Knauth, being duly sworn, deposes and says: That he is one of the attorneys for the plaintiff herein and acquainted with the facts herein and had personal charge of the action herein; that he has read the foregoing reply and knows the contents thereof, and that the same is true to his own knowledge, except as to those allegations therein stated to be alleged upon information and belief, and that as to those allegations he believes it to be true. Deponent further says that the reason why this verification is not made by said plaintiff is that said plaintiff is not in this country but is a resident of Berlin, Germany, and not at present in this

country and capable of making this affidavit; that the sources of deponent's information and the ground of his belief concerning the matters stated to be alleged on information and belief in said reply are the possession of all the original papers in the action, correspondence and interviews with the plaintiff and plaintiff's representatives, and with the defendant and defendant's attorney.

ANTONIO KNAUTH.

Sworn to before me this first day of October, 1902.

"[SEAL.] EUGENE EBLE,
Notary Public, New York County.

168 At a Stated Term of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms, in the Borough of Manhattan, in the City of New York, on Tuesday, the 22d day of November, in the year of our Lord one thousand nine hundred and four.

"Present—The Honorable William K. Townsend, Circuit Judge.

EMIL WERCKMEISTER
vs.
AMERICAN TOBACCO COMPANY.

"Now comes the plaintiff by Antonio Knauth, Esq., his attorney, and moves the trial of the cause. Likewise comes the defendant by William A. Jenner, Esq., its attorney. Thereupon a jury is impaneled and the cause proceeds to trial.

"After hearing the evidence for the plaintiff and the argument of counsel the jury, by direction of the Court, find a verdict in favor of the palintiff.

"Thereupon Mr. Jenner moves to set the verdict aside and for a new trial.

Denied.

"Stay of sixty days after entry of judgment within which to make and serve a case, with leave to turn the same into a bill of exceptions.

Granted to defendant.

169 "Thereupon, on Friday, November 25th, 1904, Mr. Jenner, defendant's counsel, moves for a new trial and to set the verdict aside.

Denied.

"An extract from the minutes.

"[SEAL.] "JOHN A. SHIELDS, *Clerk.*

"United States Circuit Court, Southern District of New York.

EMIL WERCKMEISTER, Plaintiff,
vs.
AMERICAN TOBACCO COMPANY, Defendant.

"The issues in this action having been brought on for trial before the Hon. William K. Townsend, United States Circuit Judge, and a jury, at a Stated Term of this Court, held in the Court Rooms thereof, in the Post Office Building, in the City of New York, Borough of Manhattan, on the 22d day of November, 1904, and the issues having been tried and a verdict directed by the Court in favor of the plaintiff, now, therefore, and on motion of Briesen & Knauth, the attorneys for the plaintiff, it is

"Adjudged, that the plaintiff have and retain and is entitled to the possession of one thousand one hundred ninety-six (1,196) sheets, each containing a copy of the plaintiff's copyrighted picture 'Chorus,' found in the possession of the defendant and re-
170 plevied by the United States Marshal, all as alleged in plaintiff's complaint, said sheets having been made in violation of plaintiff's copyright, and that the same are forfeited to the plaintiff and are of the value of one thousand and ten dollars ($1,010); and it is further

"Adjudged, that the plaintiff recover from the defendant the sum of eighty-nine 30/100 ($89.30) dollars, his costs and disbursements as taxed, and that the plaintiff have execution therefor.

"JOHN A. SHIELDS, *Clerk.*"

"Approved as to form.

"WETMORE & JENNER,
"Attorneys for Defendant.

"(Endorsed): U. S. Circuit Court, Southern District of New York.—Filed December 5, 1904.—John A. Shields, Clerk."

"UNITED STATES OF AMERICA,
"Southern District of New York, ss:

"— John A. Shields, Clerk of the Circuit Court of the United States, in and for the Second Circuit and Southern District of New York.

"Do hereby certify that I have compared the preceding with the original judgment, on file and of record in my office, and that the same is — true and correct transcript therefrom, and of the whole of said original.

"In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at the City of New York, in the District and Circuit above named, this 5th day of December, in the year of our Lord one thousand nine hundred and four, and of the Independence of the United States the one hundred and twenty-ninth.

"[SEAL.] JOHN A. SHIELDS, *Clerk.*"

171 PERCIVAL S. HILL, called as a witness for the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. KNAUTH:

Q. Where do you live?

A. At the Hotel Netherland, New York. I am vice-president of the American Tobacco Company, the present American Tobacco Company. I was vice-president of the American Tobacco Company during the years 1901 and 1902.

Q. Did you, as vice-president of your company, sign and swear to the verification of the answer in the suit, the record of which has been marked here Plaintiff's Exhibit P? (Handing paper to witness.)

A. I presume so. I do not recollect it at all.

By the COURT:

Q. Does that refresh your mind? He wants to know whether, after reading that, you can now state whether you did or not verify the answer in that action?

A. Yes, I remember that I verified it. The details of the verification I do not remember. I have no recollection that previous to verifying that answer I had any interviews or conversations with the American Lithographic Company. I simply say I do not remember; I do not say that I did not have that interview. It is five years ago, is it not? I say I have no recollection of any interviews with the American Lithographic Company, such as are mentioned in the verification. I have not brought with me any books of my company relating to transactions about the pictures, like Exhibit G. I was not requested to. I have been served with a subpœna *duces tecum*. I do not know what kind of a subpœna it was. I got a subpœna Monday morning. It did not call for the production of any papers or books. When I made the statement in the verification of July 23, 1903, that the information to which I there made deposition had been derived from employees of the de-

172 fendant and from officers and employees of the American Lithographic Company, having knowledge or information on the matters set forth in the answer, that statement was true.

Q. Have you any recollection of the matters happening in July, 1902, about the posters like Exhibit G?

A. I remember there was something about the poster. I do not remember the details of it. I saw such posters at that time. The only one I remember was in my office, in my room, 111 Fifth avenue; that is my office; at that time I think it was on the second floor; I am not sure. My office was distinct from other offices, if that is what you mean, but there were a number of other offices on the same floor. The supply department in the year 1902 was on a floor different from mine, but I do not remember which one.

Q. Now, what do you remember about that poster in July, 1902?

A. I remember that there was a poster gotten up for Old English, a hanger, as we call it, and it was proposed being used, and I understood that we were not to be permitted to use it. That is about the

extent of it. I think I had no communication with the American Lithographic Company about it. I do not know of any communications with the American Lithographic Company about it. I was a director of my company in the years 1902 and also in 1901. The secretary of my company now is Mr. W. H. McAllister. The treasurer is Mr. Hicks. The treasurer of the company in 1902, I am not sure, but I think it was H. D. Lee. The auditing department keeps the custody of bills or vouchers, I mean receipted bills. The present auditor is Mr. W. H. Schroder. His first name is William, I think. He is here in court. I do not know where the records of receipted bills for the year 1902 are kept. I should say the auditor has charge of them, that is where I would go for the information. Usually the legal department has charge or custody of any agreements that are made between the company and
173 others. If they are not kept in the legal department the supply department would have them, the secretary. I would have looked to the legal department for an agreement of guarantee or indemnification. As to this pleading which is now shown me (paper exhibited to witness) I do not know whether it is a pleading, but that is my signature, and I signed that as vice-president of the American Tobacco Company. It also bears the signatures of Whetmore & Jenner, defendants' solicitors.

Mr. KNAUTH: I will offer in evidence that pleading. It is an answer of the defendant American Tobacco Company.

Mr JENNER: I object to it as incompetent and irrelevant as against this defendant.

Mr. KNAUTH: I offer this pleading and also a bill of complaint to which it was an answer, and also the final decree in equity, all in the suit of this plaintiff, Emil Werckmeister, against the American Lithographic Company and American Tobacco Company in this Court, about the infringement of plaintiff's copyright by pictures like the exhibits.

Mr. JENNER: I have a stipulation here signed by the plaintiff that the judgment in that suit shall not be used in any other litigation, and here is the stipulation and I object to the counsel stating the object of his offer, because the offer is forbidden by that stipulation, signed by himself.

Plaintiff's counsel offers in evidence bill of complaint in suit in equity of Emil Werckmeister vs. American Lithographic Company and American Tobacco Company and the final decree in said suit, also the answer of American Lithographic Company in same suit.

Defendant's counsel produces stipulation dated February 7, 1905, same is marked Exhibit U and made part of the record.

174 Afternoon Session.

The COURT: I will overrule the objection to the judgment roll and receive it to determine what the effect of it is, and I will receive in connection with it that stipulation. Of course I shall hold unless there is a change, same reason. I shall hold that the stipulation would prevent the use of that judgment as a bar to any defense,

that is what the stipulation is; it shall not be a part of any defense of this action. I will take them both together. The stipulation may come in in connection with the judgment roll; put them together.

The answer is marked Plaintiff's Exhibit Q.

Other exhibits are marked as follows:

Bill of complaint contained in judgment roll is marked Exhibit R.

Answer contained in same judgment roll is marked Exhibit Q.

Defendant excepts.

The COURT: This is all objected to, each and every part of it.

Mr. JENNER: Your Honor stated that the stipulation shall be a part of the papers offered?

The COURT: No; I said nothing of the kind; that is his offer. You object to the instruction, giving them any effect, and presented this stipulation, so I said that I would receive that in connection with them, and that I would give it full force and effect according to its terms, unless in the course of the case some reason appeared why I should not. Now, I have not received either of these exhibits that they offer; they are simply marked. Now, I pause for your objection.

Mr. JENNER: Now, I produce to your Honor a stipulation between the parties in that case and the parties in this case, signed by the solicitors in that case, whereby the complainant in this case
175 stipulated that any decree which might be rendered in that suit, that is, the equity suit, in favor of complainant, should not be pleaded or offered in evidence as a bar to any defense which the defendants or either of them may have or claim to have in any other suit or action between the parties now pending or which may hereafter be pending. That stipulation is dated February 7, 1905.

Marked Exhibit U, and the following is a copy thereof:

"United States Circuit Court, Southern District of New York.

In Equity.

EMIL WERCKMEISTER
vs.
AMERICAN LITHOGRAPHIC COMPANY and AMERICAN TOBACCO COMPANY.

"The defendant's solicitors having made certain stipulations admitting the printing of copies of the painting 'Chorus' by the defendant American Lithographic Company, and admitting the offer of the deposition of L. H. Schutze, E. Eble and T. C. Miller by the complainant for the sake of expediting the final hearing of this case, the complainant by his solicitors hereby stipulates that the said stipulation and any decree that may be rendered in this suit in favor of complainant shall not be pleaded or offered in evidence as a bar to any defenses which the defendants or either of them may

have, or claim to have, in any other suit or action between the parties, now pending, or which may hereafter be pending, and further that the complainant will waive any accounting for profits in
176 this suit; any interlocutory decree in favor of the complainant to be made a final decree for injunction and costs.

Dated February 7, 1905.

BRIESEN & KNAUTH,
Solicitors for Complainant.
WETMORE & JENNER,
Solicitors for Defendants."

Mr. JENNER: I say that this stipulation binds the complainant legally and morally against offering in evidence the decree in that equity suit, because they agreed here not to do so in bar to any defense which the defendants or either of them, may have in any other action. If that decree is not a bar to some defense in this action on its face, then it has no place in this action at all.

The COURT: They say it goes to sustain the cause of action; they say it is not here as a bar to the defenses, but they say that it is competent evidence to make out the cause of action.

Mr. JENNER: I have not heard that said, but your Honor will observe the allegations of the complaint are denied, and after that denial that decree would render our denial of the allegations nugatory. However, I submit the objection.

Mr. KNAUTH: I understand this stipulation to mean that the decree which might be rendered in the action shall not be a bar to any defenses which the defendants or either of them may have, and that is all that is said. Whatever evidence that decree in that suit and the pleadings in that suit may have, is not determined by this stipulation.

The COURT: That stipulation, as it stands, prevents this decree being a bar to any defense, but it does not prevent its being used as evidence towards making a cause of action, if it does, so at this time I will overrule the objection, with the qualification that unless for some cause the stipulation has been done away with, being based on a good consideration, that it will be enforced by the Court and cannot be used as a bar to any of their defenses.

Exception by defendant.

177 PERCIVAL S. HILL resumed the stand:

By Mr. KNAUTH:

Q. Mr. Hill, who presented you with the answer in the equity suit of the plaintiff against the American Lithographic Company and the American Tobacco Company which has been marked Plaintiff's Exhibit Q, for signature.

A. I could not tell you. I don't remember. I don't remember at all how I got it. I cannot tell whether I had any interview with anybody about it, no recollection of it whatever. I suppose I knew my company had been sued. I cannot tell: I do not remember. I had no interest in the matter. I cannot tell you whether I knew

at that time or not that my company had been indemnified by the American Lithographic Company.

Q. State what your recollection of the matter is?

A. I do not remember whether I knew at the time or not.

Q. What is your present knowledge of that?

Mr. JENNER: Objected to as immaterial and incompetent.

Objection overruled. Exception by defendant.

A. I knew that we were indemnified by the American Lithographic Company against that loss.

Q. You know that you are indemnified by some agreement on the part of the American Lithographic Company, too, to keep you indemnified?

Mr. JENNER: Objected to as incompetent, immaterial and irrelevant, assuming matters not true, and also stating conclusions.

Objection overruled. Exception by defendant.

A. I know from statements made. I have seen no papers. Nothing has come under my personal observation in regard to it.

178 Mr. JENNER: I move to strike out the answer of the witness that there was an agreement to indemnify. It now appears that he has no knowledge on the subject.

The WITNESS: Your Honor, it is difficult to distinguish what you know after a lapse of time and what you know——

The COURT: The witness suggests that he understands there is a difference in a man's knowledge. He knows from statements made to him by others and things that he knows by hearsay. I suppose what the witness means to state is that he has not seen, that he did not hear the agreement of indemnity made, that he was not present, and did not take any part in it, and therefore does not know from that; that he means to say he has not seen it if there is such a writing, but that it has been stated to him that there is such an agreement. Have I got that about right?

The WITNESS: That is correct exactly.

The COURT: He knows, in other words, from its being stated to him. Now, a material inquiry would be, where did he get that information.

Mr. JENNER: Does your Honor deny my motion to strike out the evidence as secondary, stating that there was such an agreement and that he knew of it?

The COURT: He may know; he is an officer.

Mr. JENNER: I only make my motion on the evidence

The COURT: The Court when it gets ready will decide on the motion. He is the vice-president of — American Tobacco Company. Now, then, he may state, the Court rules on the motion.

Exception by defendant.

The COURT: He may state where he got that information.

The WITNESS: I got it from Mr. Wilson.

179 By the COURT:

Q. Who is Mr. Wilson?

A. He was an employee of the American Tobacco Company and in charge of this department.

Q. And did he have charge of making such an agreement?

A. I remember I got that information from Mr. Wilson and I may have got it from outside.

Q. You mean he simply told you that there was such an indemnity?

A. That is right.

Q. And you assumed it was true?

A. Yes, sir.

Q. Well, do you mean to say that you did not get that information from any of the other officers, aside from yourself, of your company?

A. I do not mean to say that; I do not remember whether I did or did not; I do not remember.

Q. Haven't you any recollection on the subject?

A. No.

By Mr. KNAUTH:

Q. Haven't you seen letters from the American Lithographic Company to your company?

Mr. JENNER: I object to the question. When your Honor is through with the inquiry I desire to make a motion. If your Honor is through my motion will be perfectly proper.

By the COURT:

Q. Do you say you never saw such an agreement?

A. No, sir; I do not say that.

Q. What is your recollection, have you seen it?

A. I do not remember having seen it.

Q. You do not remember that you had or had not?

A. That is right, sir.

Q. No recollection?

A. No, sir.

Q. And you do not know that the officers of the company having charge of the making of such agreement, having authority to make it, you do not know that they have or have not told you that there was such an agreement; do you mean to say that?

180 A. That is what I mean to say. When you say the officers of the company I presume you mean the legal department.

Q. Those having charge of it?

A. I cannot say whether they told me or not.

Q. Take the president of your company?

A. I know he did not.

Q. Or the secretary of your company?

A. I could not say; I do not remember.

Q. You do not remember one way or the other?

A. No, sir.

Q. May have and may not have?

A. Yes, sir.

Q. You do remember that Mr. Wilson told you that is all?

A. Yes, sir.

Q. And that is the only information you have on the subject?
A. Yes, sir.
Q. So that when you said there was such an agreement it is based upon that information and that general recollection?
A. Yes, sir.
Q. It is your only knowledge?
A. Yes, sir.

The COURT: Do you want to ask anything further, Mr. Knauth?

By Mr. KNAUTH:

Q. Do you know whether there was any agreement in writing or whether the agreement was verbal?
A. I do not know.
Q. Have you made any search for any agreement or papers relating to that matter?
A. No, sir.

Mr. JENNER: I now renew my motion to strike out the evidence of the witness on the ground that the statement was secondary and hearsay and as incompetent against the defendant.

Mr. KNAUTH: I will ask the witness a little further upon that, if your Honor please.

Q. Did you have any interview or interviews with Messrs. Wetmore & Jenner, or any gentleman belonging to that law office,
181 after or about the time when you signed the answer in the equity case?
A. I do not remember having any such.
Q. Do you recollect who presented to you the answer in the other case against your company for signature? (Handing paper to witness.)
—. I have already said I did not; I do not.
Q. Were the facts to which you swore in that answer on July 22, 1903, true, to the best of your knowledge?

Mr. JENNER: I object to that as immaterial, incompetent evidence and irrelevant to any issue in this case, and an improper way of eliciting testimony. While I should be glad in general to have testimony in this case in omnibus loads, I do not care to have it brought in in that manner; also as leading.

The COURT: It is an answer of his company, verified July 22, 1903. Ask him whether it was true at the time he verified that answer. I think it is a perfectly competent question. That is the one he says he signed and verified.

Mr. KNAUTH: Oh, yes, but it seems to me that alone might not make it.

The COURT: You may ask him whether or not those statements in there that he made were to the best of his knowledge and belief true when he made them.

Objected to by defendant as immaterial, irrelevant and incompetent. Objection overruled. Exception by defendant.

A. They were.

Mr. JENNER: I now renew my motion to strike out.
The COURT: I want to know first whether he is sure.
Mr. KNAUTH: One more question.

Q. Now, I wish you would state whether or not the statements which are contained in your answer to the equity case, Plaintiff's Exhibit R——

182 Mr. JENNER: I move to strike out the witness' statement that the facts stated in the answer verified by him in the action against the Tobacco Company were true, because the statement there is in the pleading itself, and the statement made to your Honor was that they were true to the best of his knowledge and belief, that he does not make the evidence of those facts competent or admissible in this case against this defendant.
The COURT: I am not ruling that they are evidence here against this defendant. I will see what there is of it. He has stated that they were true. Now, that may stand.
Exception by defendant.

Q. Now, please state whether the facts stated in the answer—your company, the American Tobacco Company, Plaintiff's Exhibit Q, and which answer was signed by you, were true, according to the best of your knowledge at the time?

Mr. JENNER: I object on the ground that the matter inquired for is matter that is incompetent and irrelevant against this defendant; it is an improper way of eliciting testimony. This statement therein made in the pleadings appear- to have been made upon information, and rendering the matter incompetent against this defendant. It is an improper way of getting at the facts stated.
The COURT: That is the answer of the American Tobacco Company?
Mr. KNAUTH: Yes.
The COURT: I am not ruling. He may state whether or not they were true.
Exception by defendant.

A. They were.

Mr. JENNER: May I now renew my motion?
The COURT: When he gets through examining regarding his knowledge I will rule on the motion. He said he wanted to ask another question.
183 Mr. KNAUTH: I think I cannot ask the witness any more questions on that point.
Mr. JENNER: I renew my motion to strike out the statements of the witness, which were in substance that he knew at one time or knows now that there was an agreement to indemnify.
The COURT: I refuse to strike it out. He has given now all the knowledge he has on the subject, which was the mere statement of the gentleman, Mr. Wilson, and then he says that he may have heard it from other sources, so that all that qualified statement goes in.
Exception by defendant.

FRANCIS A. WILSON, recalled:

By Mr. KNAUTH:

Q. Have you heard the testimony of the preceding witness, Mr. Hill, with reference to your having stated to him something about an indemnity of the American Lithographic Company?
A. I did; I heard what Mr. Hill said.
Q. Mr. Wilson, what do you recollect about that matter?

Mr. JENNER: I object to that as irrelevant to the issues in this case, as incompetent against this defendant.
The COURT: What do you recollect about what?
Mr. KNAUTH: About the indemnity agreement.

By the COURT:

Q. The witness who has just left the stand, Mr. Hill, Percival S. Hill, the vice-president of the American Tobacco Company, says that you told him that the American Tobacco Company was indemnified by the American Lithographic Company for the use of these pictures, Exhibit G; that is the substance of it. Now,
184 he wants to know what you told him on that subject?
A. What I told Mr. Hill?

Mr. JENNER: Excuse me; I desire to object to the summation of the substance of the agreement, — assuming a matter which is not in evidence. I also object to your Honor's statement to the witness now on the stand about what a previous witness has testified to, as tending to prejudice the defendant.
Objection overruled. Exception by defendant.

Q. Do you remember any conversation of that kind?
A. With Mr. Hill?
Q. Yes?
A. I do.

The COURT: Now, you ask about any such indemnity agreement. Is that what you want?
Mr. KNAUTH: Yes.
Mr. JENNER: I take the same objection.
Objection overruled. Exception by defendant.

By Mr. KNAUTH:

Q. State what knowledge of any such indemnity agreement you had at that time when you made these statements to Mr. Hill?

Mr. JENNER: Objected to as incompetent as against this defendant and as irrelevant and as immaterial.
The COURT: The Court instructs you to answer.

A. I refused to take the picture because it was marked "Copyrighted," and the matter was held in abeyance for some time, when Mr. Chapin came back to me and said, "We have consulted our counsel and have been advised that the picture can be used, and if you will order them and use them, if anything happens, why,

we will stand for it; we will hold you free of any costs of
185 damages, or liability or expenses or anything and everything whatsoever." I told him that it was not good enough for him to tell me, he must go back and get somebody who was responsible for everything if any trouble went against our brand. That is what I told him. I said, "If I give you the order for these pictures I have got to know there is nothing more for me to stand for than the price of the pictures." He went back to where he came from and brought me a writing covering that point.

Mr. JENNER: I object and move to strike out "covering that point" as secondary and stating the contents.

By the COURT:

Q. Did you read the paper?
A. I did, sir.

Objection overruled. Exception by defendant.

Q. You may state whether or not it was a guarantee. You may state first who it was signed by?
A. Mr. Donaldson, the vice-president of the American Lithographic Company.

By Mr. JENNER:

Q. Have you got the paper now?
A. No, sir; I have not seen it for three years.

By the COURT:

Q. State whether or not that paper related to this picture, Plaintiff's Exhibit G.

Mr. JENNER: Same objection.
Objection overruled. Exception by defendant.

A. It did, yes.
Q. Was that paper delivered to anybody, and, if so, to whom?
186 A. It was brought to me by Mr. Chapin; Mr. Chapin went back and brought it to me; he gave it to and left it with me.

By Mr. KNAUTH:

Q. Now, what did you do with that paper?
A. It is pretty hard for me to remember just what I did, I had it for a while in my possession in my desk. I think the first use I made of the paper was to take it to Mr. Parker's office, the legal department, and say: Is this all right—is it good enough—will it stand; will it cover us, and am I safe to give an order for these pictures on this?

Mr. JENNER: I move to strike out the evidence as incompetent as against this defendant.
The WITNESS: That was my position in the matter.
Mr. JENNER: Conversations between him and Mr. Parker.

By the COURT:

Q. You went to the legal department of your firm?
A. I did.
Q. And you made inquiries there as to whether or not that would be a sufficient protection?
A. Yes, sir; whether that paper was right.
Q. And you were advised what, that it was or was not?
A. Advised that it was.
Q. And that it was then safe for you to give an order?
A. Yes, sir.
Q. For those pictures?
A. Yes, sir.
Q. Is that it?
A. It is.

Motion to strike out denied. Exception by defendant.

By Mr. KNAUTH:

Q. Now, then, did you give an order?
A. As I said in my previous testimony, I signed an order made out in my office for those pictures. I have testified to that before two or three times.

187 By the COURT:

Q. How many?
A. Approximately 30,000 in all, — three or four different classes, with printing, with lettering and without lettering, directed to the supply department of our business.

By Mr. KNAUTH:

Q. Now, what did you do with the paper that you showed Mr. Parker?
A. Whether I brought it back with me to my room and put in my desk, or left it with him, I do not know. That is my last recollection of this clearly; I remember having it in my hands and sitting at Mr. Parker's desk and reading it over with him, and that is the last I remember clearly of making any statement. I do not know as I ever saw it again after that moment.

By the COURT:

Q. Do you know where it is?
A. I do not. I have not looked for it. I have no papers relating to the American Tobacco Company, because I have not been connected with it for three years. Certainly I know I have not got it. I have not been asked. I don't know what became of it. I cannot say that I left it with any body.
The COURT: Why don't you ask him what was in it?

By Mr. KNAUTH:

Q. Was the paper which Chapin handed to you, signed by Mr. Donaldson for himself?

The COURT: He says it was signed by Donaldson as vice-president of the American Lithographic Company.

A. I answered that question.

The COURT: The witness stated that that paper related to the use of this picture, that is in evidence here, and he has already
188 stated that it was signed by the vice-president of the American Lithographic Company, and that Mr. Chapin delivered it to him and left it with him. Now, he says he don't know what he did with it, whether he left it with — body or not, but he knows he has not got it. Now, then, if you want to prove by him anything about its contents, you are at liberty to do so.

Exception by defendant.

The COURT: Or you can try further to get the paper.

Q. Please tell us what the paper contained, if you recollect its contents?

Mr. JENNER: Objected to as secondary evidence.

Objection overruled. Exception by defendant.

A. I cannot remember the phrasing of the letter. I cannot remember the way the letter read, I could not repeat it.

Q. Can you tell us the substance of it.

A. As I said, it covered that point of holding us free and clear from any liability, that is, the American Tobacco Company, from any liability that might come from our sending out any pictures, using the pictures.

Q. Did it state what picture was meant by it?

A. I suppose it did; it would not be good for anything if it did not, and I was pretty careful about it.

By the COURT:

Q. Don't you know whether it did or not?

A. I should say it did, of course.

Q. Don't you know whether that letter or paper——

A. I cannot remember whether the name of the picture was a part of that letter.

Q. Did it describe the picture in any way?

A. The letter was about that picture; that is all it was about; it was not about anything else; it referred to that and nothing
189 else. Whether it mentioned the name of the picture in the letter, or the artist, my recollection is the name I gave it, "Here's to Old English," it was the name that was in the letter.

Q. That is the name you knew it by?

A. That is the name I knew it by, instead of Sadler's name, "Chorus."

Q. You called it in your firm, "Here's to Old English"?

A. Yes, sir, that is the name.

Mr. KNAUTH: I now offer in evidence the picture Exhibit G, which was heretofore offered for identification only.

Mr. JENNER: I object to it as incompetent against this defendant and no foundation laid for it.

Objection overruled. Exception by defendant.

The picture heretofore marked for identification Plaintiff's Exhibit G is now marked in evidence Plaintiff's Exhibit G.

Q. Do you remember whether at this time when you had this interview with Mr. Chapin you were already in possession of some copies, or a copy of the Plaintiff's Exhibit G?

A. Why, no, I do not see how that would be possible, because the agreement was made before the pictures were printed.

Q. How soon after did you receive any copies like Exhibit G?

By the COURT:

Q. Did you receive any, first? After that paper was given to you, that letter, we will call it a guarantee, in the nature of a guarantee, after that did you or didn't you receive any of these pictures such as Exhibit G, like that?

A. I did.

By Mr. KNAUTH:

Q. Now, do you remember when you received such pictures?

A. As I testified yesterday, they came to me as proofs over
190 a considerable period, and then there was a suspension of work for several months, and then after that I think as many as 100 copies were brought to my office at my suggestion for me to look over and pass on the character of — work whether it was good enough to accept. Of course I had no occasion to have any stock or quantity of pictures in my office, except for examination, first, to pass on the proofs, whether they would accept them or not, and second, to pass on the work to say whether they were acceptable, to see whether we would use them.

Q. And then you accepted one of those proofs?

A. Accepted it as good, yes.

Q. And did you thereafter receive quantities of these pictures like Exhibit G?

A. Not in large quantities. I have stated what we received. I could not tell just how many. All this was previous to the 23d of January, 1902, when the marshal came and seized these pictures, it had to be.

Q. It all took place between July 1, 1901, and July 1, 1902?

A. What date is July 1, 1901, I am not sure. I do not know when Mr. Chapin first brought me that original woodcut, whether in 1900 or 1901.

Q. You said it was about the year 1901 that he first brought it?

A. Very well, about that.

Q. With whom did you have these consultations about the proofs of this picture?

A. Different ones. Sometimes they would be brought into my room from the supply department, as it was a part of their work to receive proofs and take them to the different managers, who were having work done, and take the manager's criticisms or comments or orders, and transmit them to the supplier, meaning the printing company. At other times the representatives of the printing com-

pany would come directly to my room, I preferred to have them, and express my own views instead of having them go through any one else, so I cannot say I had the talks with any one in particular, because I know I did with several different ones.

191 Q. When you said the representatives of the printing company, you meant the American Lithographic Company?

A. Yes, in connection with that picture, but I had twenty different pictures going through at the same time.

Q. About this picture you had discussions only with the American Lithographic Company, I suppose?

A. Certainly, nobody else knew anything about it.

Mr. KNAUTH: That is all of this witness.

WILLIAM H. SCHRODER, called as a witness for the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. KNAUTH:

Q. What is your occupation?

A. I am auditor of the American Tobacco Company, since October 20, 1904, and before October 20, 1904, I was auditor of the Continental Tobacco Company. I had nothing to do with the American Tobacco Company for six years before October, 1904. I mean not during the period from 1898 to 1904. As auditor of the American Tobacco Company, all vouchers, all books of account, are in my possession. I have not looked for vouchers relating to a transaction between the American Lithographic Company and the American Tobacco Company during the year 1902. I have no vouchers in my possession relating to transactions between the American Tobacco Company and the American Lithographic Company in the year 1902. They are not in existence. When the new American Tobacco Company was formed in 1904, we found a great accumulation of papers of all kinds, vouchers and books and things, and I had a consultation with the officials, with three or four of the officials, I cannot recollect who they were, and it was decided to destroy everything to and including the year 1904. Everything prior to 1904 was destroyed in the beginning of 1905. I

192 know it was destroyed because I saw it destroyed. I was present. All vouchers which were kept for that time, up to 1904, were destroyed. I have no knowledge of any agreement between the American Tobacco Company and the American Lithographic Company. I have not in my possession any books which would show transactions between the American Tobacco Company and the American Lithographic Company during the year 1902. There could not be any books that have anything to do with the American Litho. Company; there is never any account kept with the American Litho. Company; there is not to-day. We just buy from them and get their bills and pay their bills and put them on file, that is all. I have no knowledge of order books in which orders were entered as Mr. Wilson ordered supplies from time to time. I have no such order books in my possession. They would not go into my possession. They would stay in that department.

I know nothing about the existence of such order books for supplies which were kept up in the year 1902. I never knew anything about them at all. I was not connected with the company at that time, so I could not know. I did not as auditor of the company, when I took possession of the company's books in 1904, also get possession of certain order books. I do not know whether there were any such order books. I had no reason to make any inquiry they were of no use to me. I have no delivery book in my department. I have never seen any such delivery book; they would probably be kept in that department; that is all I know. Each department has its own delivery book or order book.

193 JOHN M. W. HICKS, called as a witness for the plaintiff, being duly sworn, testifies as follows:

Direct examination.

By Mr. KNAUTH:

Q. What is your occupation?

A. Treasurer of the American Tobacco Company since the formation of the present company, and before then I was treasurer of the old American Tobacco Company; treasurer and assistant treasurer together since 1890; the first part of the time I was assistant treasurer, and the latter part treasurer. In the year 1902 I think I was assistant treasurer; my recollection is Mr. H. D. Lee was treasurer. Now we have not a separate treasurer's department. The books of account are all supposed to be under the direction of the auditor, who has charge of the accounts and books. I was not a director of the American Tobacco Company during the year 1902. I am not a director now.

Q. Have you any knowledge of any suit or litigations commenced against your company in the year 1902 by this plaintiff, Emil Wereckmeister?

A. Yes, I have heard the testimony in court. Whether I had any such knowledge in the year 1902 I could not say, I do not know. I do not recollect any. I have no knowledge of any agreement between the American Tobacco Company in 1902 and the American Lithographic Company. I have never seen any such agreement. I cannot tell what has become of the books that were kept in the supply department of the American Tobacco Company in 1902. I have heard most of the testimony of Mr. Wilson here that there were certain order books and certain delivery books in that department. I heard him testify about such books. I do not know anything about such books and never did know. I attended here under a subpœna. I have not made any search for the books and papers relating to transactions between the American Tobacco Company and the American Lithographic Company in the

194 year 1902, referred to in that subpœna, for the reason that the subpœna that was served on me had a list of names, and among others, Mr. Fletcher, who was the auditor of the company at that time, and the books and papers at that time were in his charge,

and not mine. That was the witness, James Fletcher, Jr., who has been attending here. And that was the reason why I did not make any search.

THOMAS S. DURHAM, called as a witness by plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. KNAUTH:

Q. What is your occupation?

A. Cashier of the American Tobacco Company since 1892. I was cashier during the years 1901 and 1902. We have had transactions all along with the American Lithographic Company, in the nature of bills passed up to us, and we issued checks for them. I paid the bills on behalf of my company.. That was being done all through the year 1902. I do not know what the bills were made out to my company for, nor whether they were for lithographic work. I saw the bills from time to time. Of course we knew that they were buying lithographs and other things from the American Lithographic Company, but I did not know what for, and I did not ever know what they were for. But it was all for printing matter or lithographic matter. I had the checks written for those bills as they were rendered. I paid in every instance the bills as they were rendered. I wrote the checks or had them written. After the checks left me they were sent to the auditor and treasurer to be signed, and then to the mailing clerk to be mailed out; that was the ordinary course of business. I never afterwards received the receipted bills; did not see them. They went on file. I do not know where they are now. I have no knowledge of any indemnity agreement between the American Lithographic Company and the American Tobacco Company; never had any knowledge. I am
195 not a director of the company; was not a director in 1902.

Q. Have you any knowledge of the pictures of which Plaintiff's Exhibit G is a specimen?

A. I have no knowledge whatever of it. I have seen the pictures before; where I cannot recall.

Mr. KNAUTH: I think that is all of this witness.

By the COURT:

Q. Just a moment. You say you drew the checks for these bills?

A. I either drew or had them drawn; I was in charge; it was my duty to see that they were properly drawn. I did not sign them; the treasurer and auditor did. All I had to do was to see they were properly prepared. The bills came over usually from the voucher department, and the total amount of that batch accompanied the bills, and the total of our check books would have to agree with that. I saw the bills so as to know how much to make the check for and to whom. Then the bills and checks went to the treasurer and auditor to be signed. Before I would make out a

check the bills came up from different departments, and the manager of that department would O. K. the bill in some way so that I would know how to make out the check for the whole bill, and then I would send them back. I cannot tell now who in 1902 would be the person in charge of the supply department whose duty it was to O. K. the bill. I do not now remember.

Cross-examination.

By Mr. JENNER:

I made out checks to the order of the American Lithographic Company nearly every day, and that was true of the period of 1901 and 1902 down to the present time: sometimes I made checks to the order of the American Lithographic Company several times a day.

196 FRANCIS A. WILSON, recalled:

By Mr. KNAUTH:

Q. Mr. Wilson, do you recall what price was agreed upon between you and Mr. Chapin for the furnishing of these pictures like Plaintiff's Exhibit G?

Mr. JENNER: I object. There is no foundation laid for the question.

Objection overruled. Exception by defendant.

A. I am not sure what the price agreed upon was. My recollection is that it was 6½ or 7½ cents a piece. I may be a cent or two out of the way, but that was about the value of that size of lithographs prints, about the average value. We had a great many thousand of them.

By the COURT:

Q. We would like your best recollection of it?
A. Yes, sir.

To Mr. KNAUTH:

I also said that some of these pictures had been made on satin instead of paper, just a few. I think—no, I cannot say I remember, but I think those on satin were to cost us a dollar a piece for 100, that is my best recollection — the subject. I am very sure of that because that was a special bargain. I remember about seeing bills for these posters. I marked those bills. The habit or custom in my office as to the payment of such bills was, before a bill could be paid the order having gone through the supply department to the supplier, the bill had to come from the supplier to the supply department to be verified by them as to quantity and as to price, as to whether it conformed to their records; if it did, they O. K'd it for quantity and price. It never came to me or would be recog-
197 nized by me unless it had those two checks on it, and when it came with the rubber stamp of the supply department, then I would check it to be paid. It could not be paid otherwise by the

supply department for quantity and price. When I had checked those bills. I passed them to my clerk to be taken either to the auditing or cashier's department. I would not be able to say now what the routine was. They were to be paid.

Q. And you recollect that the bills for these posters like Exhibit G came to you in that way marked and were marked and checked by you in the ordinary course of business, do you?

A. Some did, yes.

Q. Was there any difficulty with reference to any of those bills or their payment relating to these posters, so far as you recollect?

A. I do not think so; I cannot really recall anything, that is—

The COURT: What he is seeking to know is you say bills came for these posters, as you call them.

The WITNESS: Yes.

By the COURT:

Q. These pictures?

A. Yes.

Q. Who did those bills come from?

A. From the supply department to me; they could not come to me until they were all checked by the supply department.

Q. They were bills made out in the favor of whom?

Mr. JENNER: Objected to as incompetent.

Overruled. Exception.

Q. Bills in favor of the American Tobacco Company?

A. Bills from whom?

Q. Yes.

A. From the American Lithographic Company.

Q. Bills against the American Tobacco Company?

A. Yes.

Q. And they came for your approval?

198 A. For my official approval and acceptance. I put a mark on them.

Q. Were they received from time to time?

A. Oh, yes, sir.

Q. After they commenced coming he used the word "hitch." Was there any pause at any time when the bill came, or bills came, that any question was raised about them, the propriety of them, or the propriety of payment, so that they were held up at any time. Is that what you want?

Mr. KNAUTH: Yes, exactly.

A. I do not exactly know. There was a stage in the development of the picture where I rejected the whole edition, because they were printed too dark in the top, the background, and they were held in abeyance for several months, as I said before, and then we were approached with an offer at a less price than the original price quoted if we used the pictures as they were. Whether any bills came to us for pictures in the first stage, that is, as they were originally printed, I do not think they did, because I do not think

any were accepted; I do not think any were delivered beyond a few proofs. I have no reason to think that any bills were rendered for the pictures until the second agreement as to price was made, and when that agreement was made, any bill that came went through, as a matter of regular routine, because there was no question about it.

By Mr. KNAUTH:

Q. Who came to you with the suggestion of a lower price on the pictures.

A. Well, I think that was done through the supply department.

Q. You mean there was nobody coming to you directly from the American Lithographic Company?

A. I do not think so; that was so the price—that was the contract that had been agreed upon between the supply department
199 and the printer; that was not my job. If I wanted them I would authorize them to buy them; if I did not I would not; I rejected them.

Q. So your recollection is that after the price and the picture had both been adjusted to your satisfaction, then deliveries followed in the regular course of business?

A. Yes, some few.

By the COURT:

Q. Put in this way: Was there any delivery of these pictures where a delivery was made that came to your knowledge; was there any delivery that was not paid for that you know of?

A. Your Honor, I do not know that any of them were paid for.

Q. All you know about it is this: If a bill came for some of these pictures it had to pass through two hands before it came to you; is that right?

A. One, the supply department; they put two checks on it.

Q. Those bills should go to the supply department first?

A. Yes, sir.

Q. And there it would go through two different hands, wouldn't it?

A. Yes, they kept two different records, price and quantity.

Q. And they had to check that bill first as to price, and second as to quantity

A. Yes, sir; then it came to me and then I approved it, and then it went to the cashier or place where they did the paying. My knowledge of it ended when it left my hands. The receipted bill never came back into my hands.

Q. So there your knowledge ended. In the course of the business or in the discharge of your duties, did you ever learn of any delivery of these pictures that came to the supply department that they did not honor or check to be paid?

A. No, sir.

Q. Did you in your department ever refuse to check any of the bills that came to you with these marks on them from the supply department?

A. No, sir.

200 Q. Then did you know that up in the cashier's office, or where it was after they left your office, that the payment of any of them was refused?

A. I have no knowledge of that.

The COURT: That is all he knows about it.

Q. You never learned of any such refusal?

A. No, I never did.

Mr. KNAUTH: That is all of this witness.

CHARLES M. STROTZ, called as a witness for the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. KNAUTH:

Q. What is your occupation?

A. I am in the employ of the American Tobacco Company, since October, 1894; and with the former American Tobacco Company from May, 1899, until October, 1904. In 1901 and 1902 I was secretary of the American Tobacco Company. I attended and kept the minutes of the meeting of the Board of Directors and Stockholders. I was in charge of the department of manufacture. As far as the active duties of the secretary were concerned, excepting the attendance at the meeting, they were in charge of an assistant. I have not got the minutes of the meetings of the Directors of the American Tobacco Company during the years 1901 and 1902. I do not know where those minutes are. I had them during those years; personally I did not do anything with them. I presume that they were delivered by my assistant to the secretary of the present American Tobacco Company at the time of the merger; that is the last that I know of those minutes. I haven't seen them since that time. That merger was in October, 1904. I had them up to that time, that is, they were in the secretary's office in charge of an assistant. I have no knowledge of the pictures like Plaintiff's Exhibit G being received by the American Tobacco Company in the year 1902, didn't see them. I have no knowledge of
201 any agreement between the American Tobacco Company and the American Lithographic Company concerning such pictures in the year 1902. I had no such knowledge excepting what I derived here in this court room, no previous knowledge. I have no personal knowledge of the existence of books in the supply department of the American Tobacco Company in the year 1902, never saw those books.

Mr. KNAUTH: Nothing more of this witness?

CHARLES EDDY, recalled by plaintiff:

By Mr. KNAUTH:

Q. Mr. Eddy, have you brought with you any business books of your company, the American Lithographic Company, containing

any record of transactions between that company and the American Tobacco Company, in the year 1902?

A. No, sir.

Q. Were you not subpœnaed to come here and bring those books?

Mr. JENNER: I object. It is calling for the witness' conclusion as to a legal fact. There was a paper served upon him on that occasion.

Mr. KNAUTH: The subpœna has already been offered in evidence and the question is simply a repetition.

The COURT: Hand it to me and let me see it (paper handed to Court). This subpœna says "all business books of said defendant"—that is, the American Lithographic Company—"containing entries relating to the manufacture and sale by it of certain posters or chromos called 'Here's to Old English.'"

By the COURT:

Q. Do you know what that refers to—that picture? Is this the subpœna served upon you, Plaintiff's Exhibit F (exhibiting paper to witness)?

A. Yes.

Q. This subpœna says, it requires you to bring here, to produce "all business books of said defendant, containing entries
202 relating to the manufacture and sale by it of certain posters or chromos called 'Here's to Old English.'" Now, do you know what picture that relates to—what picture it means?

A. Only what I have heard here in court, sir.

Q. You heard that last when—Monday was the first time?

A. I do not remember; I think Monday was the day I was on the stand.

Q. You heard it Wednesday, didn't you?

A. Either Monday or Wednesday.

Q. Now, have you brought any books, any book or books relating to that?

A. No, sir.

Q. Have you looked to see if there is any such book?

A. I have looked through the ledger and day book.

Q. Of 1901 and 1902?

A. Yes, sir.

Q. 1903, 1904, along there?

A. I do not remember that I went as far as 1904.

Q. 1902.

A. 1901 and 1902.

Q. Did you go as far as 1903?

A. I do not think so, sir.

Q. 1901 and 1902?

A. I think not all through 1902.

Q. You looked part way. How far through 1902?

A. Those are two years, I think, I went through, 1901 to 1903.

Q. You went clear through then, did you?

A. Yes, sir, from July to July: I think that is it.

Q. Did you examine carefully?

A. I examined the ledger carefully. I went over the day book—it is rather large, and I went over it rather hastily.

Q. Did you find in those books any entries relating to any such picture?

A. No, sir.

Q. Or any dealings with the American Lithographic Company?

A. Our company is the American Lithographic Company.

Q. I mean the American Tobacco Company?

A. Yes, sir.

Q. You looked to see if there were any entries in regard to lithographic work?

A. No entries of any kind.

203 Q. How?

A. I looked for any entries of any kind with the American Lithographic Company.

Q. Any transaction between your company and that company?

A. Yes, sir.

Q. Did you find any?

A. I found some; yes, sir.

Q. Well, in what book? In those books you mentioned?

A. In those books I mentioned.

Q. You found some entries?

A. Yes, sir.

Q. Relating to lithographic work?

A. Yes, sir.

Q. Necessarily would be, probably?

A. Lithographing and printing.

Q. But you did not bring the books?

A. No, sir.

Q. "Also all correspondence with the American Tobacco Company relating thereto." Did you look for such correspondence?

A. No, sir.

Q. You did not look for it?

A. No, sir.

Q. So, whether there is any or not you do not know?

A. I do not.

Q. And you have not produced any?

A. No, sir.

Q. Or made any effort?

A. No, sir.

Q. "And all receipts executed by that company for such posters." Have you any such receipts?

A. I have not, sir.

Q. You do not know whether there are any or not?

A. I do not know, sir.

Q. And you have made no effort to bring them?

A. No, sir.

Q. "Orders for delivery and all memoranda relating to such manufacture and sales," that is, of these posters. Have you looked for any such orders for delivery and memoranda relating to it?

A. I looked through some books where orders are entered to see if I could find anything in regard to that.

Q. Does your company have a delivery book; anything that equals it?

A. I presume they have a delivery book.

Q. You say orders for delivery. What book did you look in?

A. The orders for the goods themselves.

204 Q. When you received an order for goods?

A. It is entered.

Q. Is it entered or filed; what order is put in the book?

A. A copy of the order is written in the book, and I presume the original order is filed.

Q. Sometimes they do it one way and sometimes the other, and I do not know how you do it. Have you looked for such orders?

A. I looked in the books.

Q. Did you find any?

A. No, sir.

Q. Did you look where such orders, if copied, would be likely to be?

A. Where the entries would be?

Q. Yes.

A. The original orders, I would not know where to look for them.

Q. Did you make any inquiry about that?

A. No, sir.

Q. Did you look for the entries in these books?

A. In this book; yes, sir.

Q. Did you find any entries?

A. No, sir.

Q. Did you look for memoranda?

A. No, sir.

Q. Relating to the manufacture or sale of any such prints or picture?

A. No, sir.

Q. Between these dates?

A. No, sir.

Q. You say you did not look for any?

A. No, sir.

Q. Why not?

A. If you will allow me to explain, I did not understand that I was to bring them here. It states there things that were in my custody, and none of these things were in my custody.

Q. If you have in your custody or power. Have you fully described in answer to the questions of the Court what you have done towards complying with that subpœna?

A. Unless the bringing of the minute book might be considered——

Q. Have you brought the minutes books as secretary to the company?

A. Yes, sir.

Q. Those you have brought?

A. Yes, sir.

Q. If there is anything else you have done just state it?
A. In regard to the compliance with this?
Q. Yes.
A. Nothing, sir.

205 Mr. KNAUTH: I ask your Honor to direct this witness to make a further search for the books and papers which are specified in the subpœna and to bring them into court with him to-morrow morning. And in support of that motion I say that we have also subpœnaed under a subpœna *duces tecum* the treasurer of the company, but he has excused himself by an operation which was performed upon him last Saturday. He has not been in court since that time, and I am doubtful whether he will be in court before this case is determined. It seems to me there should be no difficulty that the secretary of the company should obtain the necessary authority to bring all these books here where they are wanted, in the absence of the treasurer, who may be sick.

Mr. JENNER: I understand that Mr. Ettlinger has been at his office to-day ill, but would make an effort to come down here if plaintiff's counsel desired him to come, but he did not wish to come and did not feel able to come simply to sit around.

The COURT: Who is that?

Mr. JENNER: Mr. Ettlinger, the gentleman Mr. Knauth has referred to that he has subpœnaed. Now, I object to any such order being made because in these *qui tam* proceedings the books of the defendant are privileged under Section 724 and cannot be enforced by an order of the Court or by a subpœna *duces tecum*. I also object to your Honor's instructing the witness to obtain authority from somebody else, as the witness would not be bound to do it, and such instruction as that would be illegal. On that proposition I can submit authorities to your Honor if your Honor desires it. Judge Lacombe I understand has just held, very recently held, in conformity to that proposition.

The COURT: What proposition?

Mr. JENNER: That I have just made, that it is not the province of an officer of a corporation to go around and seek au-
206 thority to bring down books. He is only chargeable with the books in his custody.

The COURT: How would you do it?

Mr. JENNER: Who ever has custody of the books and if they can be produced by your Honor's order, irrespective of a subpœna.

Mr. KNAUTH: Well, we have been unable to subpœna the vice-president of the company.

The COURT: Presumptively the secretary of the company has charge of the books of a company generally.

Mr. JENNER: No, sir; not under the Code of Procedure of this State, and I have an authority here.

The COURT: Who is this?

Mr. JENNER: The president.

The COURT: Where is he?

By Mr. KNAUTH:

Q. Where is the president of your company?
A. I do not know, sir.

Mr. JENNER: Mr. Eddy has been in Court here every day this week. How should he know?

The COURT: You have also the vice-president here, haven't you?

Mr. KNAUTH: No, sir, he is out of town. We have had a detective after him all the week. We have not been able to find this person, although it has been reported that he has been in town.

The COURT: Do I understand the treasurer has been in town, at his office to-day?

Mr. KNAUTH: Yes, sir; he has been seen in the office, but when our detective went there he found the desk locked and the treasurer gone.

The COURT: He has been subpœnaed?

Mr. KNAUTH: Yes, sir, he was subpœnaed and he was here last week.

The COURT: He was subpœnaed to bring the books?

Mr. KNAUTH: He was subpœnaed to bring the books. The
207 vice-president we have been unable to find, because it has been reported at his house that he is out of town, and he has remained out of town all the week and he is still out of town, so I see no opportunity of bringing these books here except by this witness who is here and Mr. Ettlinger, who, counsel for defendant says, is willing to attend to-morrow.

The COURT: Who is?

Mr. KNAUTH: The treasurer of the company is expected to attend to-morrow.

Mr. JENNER: Do not understand that from me. Mr. Ettlinger was here in Court. I stated on Monday that he had had a surgical operation performed on his head Sunday morning and he was unable to come down and had sent down a physician's or surgeon's certificate.

The COURT: He is not here today. It is easy enough for him if he has any purpose to comply with the subpœna of the Court, it would be easy enough for him to send down the books by Mr. Eddy or by some other official, and we will make a trial and see if he gets around to-morrow. If not we will see if there is any way to get at him. I think there is. Possibly they are more powerful than the Court, but we will make a desperate effort to see if the authority of the Court can be defied or not. It will be time enough and this Court will be perfectly willing to wait from day to day for all necessary legal proceedings. It is now half after four, and one of your gentlemen desires to attend a funeral to-morrow morning, one of the jury, so that you may be a little late, and probably will, and therefore I will adjourn the Court now until a quarter after eleven o'clock to-morrow morning.

To Mr. EDDY (the witness): You better try to get those books here. Of course; take your own course.

Adjourned to Friday, November 9, 1906, at 11.15 A. M.

208 NEW YORK, *November* 9, 1906.

Mr. JENNER: Before you proceed, Mr. Knauth, I will move to strike out the answer of the defendant The American Lithographic Company in the suit of Emil Werckmeister against that Company and the American Tobacco Company, in equity, which was put in evidence yesterday, on the ground that the same ought not to be received in evidence under Section 860 of the Revised Statutes.

The COURT: What is the section of the Revised Statutes?

Mr. JENNER: It provides that, "no pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States in any criminal proceeding, or for the enforcement of any penalty or forfeiture."

The COURT: Let me take the answer and see what it says. (Paper handed to Court.) What do you say?

Mr. KNAUTH: I will not oppose that motion. I think the objection may be well taken.

Mr. JENNER: I move to strike out the decree in the same suit on the same ground in view of the further fact that the answer has been stricken out.

The COURT: The answer of what?

Mr. JENNER: The answer of the defendant in that suit.

The COURT: Of the defendant, the American Lithographic Company?

Mr. JENNER: Yes, sir.

The COURT: Strike it out. Motion granted.

Mr. KNAUTH: Now I will offer in evidence a notice to produce served upon the defendant's attorney October 18th.

Mr. JENNER: I object to its being received in evidence.

209 I admit such a notice was served upon the defendant's attorneys October, 1906. It is not a proper subject for evidence.

The COURT: You may note, Mr. Stenographer, and mark this, not as an exhibit in the case, not as evidence in the case, but received by the Court to advise it of the fact that this notice to produce has been properly served.

The paper is marked Exhibit V.

Mr. KNAUTH: Now, I call upon the defendant to produce the correspondence between it and the American Tobacco Company, or any officers or employees of the company relating in any manner to ordering, making. Will you produce it?

Mr. JENNER: I have no such papers in my possession or under my control or in my custody.

OTTO VON SCHRENK, called as a witness for the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. KNAUTH:

Q. What is your occupation?

A. I am a lawyer; I was associated with the firm of plaintiff's

lawyers, Briesen & Knauth, in the year 1902. I remember the visit with the Marshal of this Court at the office of the American Tobacco Company, which has been testified to in this action, quite distinctly. On the occasion of such visit I saw several people. The first one that I saw was Mr. Junius Parker, the counsel for the American Tobacco Company. He was in his private office at 111 Fifth Avenue, which is the place of business of the American Tobacco Company. With Mr. Parker and the Deputy United States Marshal we went to the private office of Mr. Duke, the President of the American Tobacco Company, and served replevin papers, summons, &c., on Mr. Duke. Then we returned to Mr. Parker's office, and he sent for Mr. Wilson, the manager of the curve cut department. Mr. Wilson, a short time after that, came into
210 the room of Mr. Parker, and he and Mr. Parker then had extended conversation in regard to the replevin papers which had been served on Mr. Duke; that was in my presence. Mr. Parker suggested to Mr. Wilson that he get us a statement——

Mr. JENNER: I object to any statement of anything that transpired as incompetent evidence against the defendant, the defendant not being represented or a party to it.

The COURT: Now, what he found and saw there let him tell.

Q. Will you state on that occasion — you found any posters like plaintiff's Exhibit G at the office of the American Tobacco Company?

A. I did. With Mr. Wilson we went upstairs to another room, which was Mr. Wilson's room, with Mr. Wilson, the Deputy Marshal and myself. We made a thorough search of that room for pictures of the kind such as Exhibit G, and we found in all 203 copies of that picture, in all respects like that picture, with the exception that some had tin edges on the top and bottom, one or two were framed and several were printed on silk, but altogether there were 203 copies of the picture like that exhibit. Those pictures were put in a box, nailed up in my presence, and I assisted in taking them downstairs and putting them on a truck and taking them down to the Post Office Building and putting them in the custody of the marshal here. A paper was handed to me on that occasion by Mr. Wilson. Mr. Wilson had a typewritten statement of the number of copies of this picture in his hands which he had shown to Mr. Parker.

Mr. JENNER: I move to strike out the contents of the paper as secondary.

The COURT: I will see what there is about it.

Exception by defendant.

211 WITNESS: I was present when Mr. Wilson handed that statement to Mr. Parker. Mr. Parker read it over and gave it back to Mr. Wilson. That was one of the numerous trips that we made upstairs and downstairs. We first had a discussion in Mr. Parker's office. Then Mr. Wilson was called down, and with Mr. Wilson we went upstairs again. Mr. Wilson then went downstairs with us again and had some further conversation with Mr. Parker.

We then went upstairs to his room a second time. Then he went downstairs and handed the statement to Mr. Parker, and we finally went upstairs a third time, as I recollect it, and made a search for these pictures, and on this third trip upstairs I asked Mr. Wilson to let me have a copy of that statement which he had handed to Mr. Parker. Mr. Wilson gave it to an office boy, and the office boy in my presence made a press copy of that statement, and that he gave to me. It is in the court room here somewhere.

Q. Will you look at Plaintiff's Exhibit I and state whether that is the press copy which was handed to you (handing paper to witness)?

A. That is the press copy handed to me. I can identify it because I put my initials on it at the very time it was handed to me.

Mr. KNAUTH: I will offer in evidence the paper which heretofore has been marked.

Defendant objects. Objection sustained.

Mr. JENNER: Now I ask your Honor to rule on the motion which I made a few moments ago to strike out the statements of the witness of his conversation with Mr. Parker or Mr. Wilson—I do not recall the exact statement. It is a motion which I made to strike out, and which your Honor reserved.

The COURT: Well, you may strike it all out. Then I will call the attention of the witness to what may stand. Strike that all out.

212 By the COURT:

Q. You went there, witness, when?

A. June, 1902.

Q. With the Marshal?

A. With the Deputy United States Marshal.

Q. With the Deputy United States Marshal?

A. Yes, sir.

Q. And you found Mr. Wilson?

A. Yes, sir.

Q. And other employees?

A. And officers.

Q. And you found Mr. Parker, the attorney who was here yesterday?

A. Yes, sir.

Q. And you made inquiries, did you, for pictures of this character?

A. I did.

Q. In company with the Marshal?

A. In company with the Marshal at all times.

Q. He was armed with some sort of process?

A. He was armed with the process of this court.

Q. And Mr. Wilson conferred with Mr. Parker in regard to such pictures?

A. Mr. Wilson had several conversations——

Q. You need not say what was said?

A. He conferred with Mr. Parker in my presence.

Q. On two or three different times?
A. On several occasions.
Q. The paper that you have referred to was made there?
A. Yes, sir.
Q. And copied on a typewriter?
A. On a press copy.
Q. A press copy?
A. Yes, sir.
Q. And a letter press copy given to you at your request?
A. That is correct; yes, sir.

The COURT: This exhibit, what is it?
Mr. KNAUTH: Marked for identification Plaintiff's Exhibit I.

Q. And Mr. Wilson took you upstairs?
A. Yes, sir.
Q. Into a room which you say he stated was his room?
A. Yes, sir.
213 Q. And there you found and took possession of 203 copies of this picture?
A. 203 copies of this picture.
Q. You say they were all alike with the single exception that a few had tin edges, is that right?
A. Yes, sir.
Q. And some were printed on silk?
A. Yes, sir, and some were framed.
Q. And some few framed?
A. Yes, sir.
Q. You took possession of them all, or the Marshal did?
A. The Marshal took possession of them with my assistance.
Q. And you brought them to the Post Office Building, or assisted him in doing it, and you saw them safely in his custody here?
A. Yes, sir.
The COURT: All that may stand.

Mr. JENNER: I object to it and every of your Honor's questions, on the ground that the matter elicited by your Honor's questions is incompetent as against this defendant, and I move to strike the answers out.

The COURT: It is received simply to show that at that time this picture there was in the possession of the American Tobacco Company at its office and place of business; 203 copies of this picture.

Mr. JANNER: I take an exception.

No cross-examination.

Mr. JENNER: I now move to strike out the testimony of Mr. Wilson in respect to the interview with Mr. Schrenk and the Assistant or Deputy United States Marshal on the subject of this letter press copy of the statement, on the same ground as incompetent as against this defendant.

The COURT: No, I deny that motion, and will give you an exception.

Exception by defendant.

Mr. JENNER: I move to strike out the evidence of Mr. Parker on the same subject as incompetent as against this defendant.

214 The COURT: I deny the motion. It is not evidence in the strict sense; it doesn't prove anything against this defendant. It serves simply to refresh their recollection as to a transaction there about those copies and their knowledge of copies.

Mr. KNAUTH: Now, I call upon the defendant to produce a letter from Mr. Junius Parker of July 2, 1902, addressed to Mr. Robert Donaldson of the American Lithographic Company.

Mr. JENNER: I have no such letter. When did you give me notice to produce it?

Mr. KNAUTH: On October 18th.

Mr. JENNER: I have no such letter. Where is it mentioned in the notice of October 18th?

Mr. KNAUTH: The notice mentions all the correspondence relating to this picture between the 17th of July, 1901, and the 17th of July, 1903. I will recall Mr. Wilson.

FRANCIS A. WILSON resumes the stand.

Mr. KNAUTH: Perhaps I might save time here by stating that Mr. Parker is engaged in court, as I understand, in this building, and it is inconvenient for him to appear here and bring his press copy book of his letter which he promised to bring yesterday when he was called upon, but I understand that the witness Wilson has it in court, and I want to read in evidence the press copy of the letter of July 2, 1902, which was referred to.

The COURT: Is it admitted that this is a book of Mr. Parker containing his letter press copies?

Mr. JENNER: I will admit this is the letter press.

The COURT: Then it is admitted that the book contains copies of letters——

Mr. JENNER: For the purpose of this letter and not for any other purposes.

Mr. KNAUTH: Then I will offer in evidence the press copy of the letter of Mr. Junius Parker, dated July 2, 1902.

215 Mr. JENNER: I object to it as secondary evidence; no evidence that it was mailed or that it was received; there is no evidence that it was received.

Mr. KNAUTH: The letter was referred to in one of the exhibits yesterday.

The COURT: I will receive it.

Exception by defendant.

Marked Plaintiff's Exhibit X.

The COURT: I will read it. It is on page 487 of Mr. Parker's copy book, or copies of letters, and in lead pencil on the same page are the figures "375"—whatever that means I do not know.

"NEW YORK CITY, *July* 2, 1902.

"Robert Donaldson, Esq., American Lithographic Company, 19th Street and Fourth Avenue:

"DEAR SIR: I herewith hand you copy of a summons or subpœna in equity served to-day on one of the vice-presidents of this company in the case of Emil Werckmeister against your company and this company. This, I have no doubt, refers to the alleged infringement of the copyright of Werckmeister by the picture advertising Old English plug cut, called 'Chorus'. We expect, of course, that your counsel will appear for this company as well as your company in this litigation and without compensation from us.

"Very truly yours,

"(Signed) J. PARKER.

Encl."

216 LOUIS ETTLINGER, called as a witness for the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. KNAUTH:

I reside at 40 East Seventy-third street. I am treasurer of the American Lithographic Company. I was treasurer of the American Lithographic Company during the years 1901 and 1902. The office of that company was Nineteenth street and Fourth avenue. The company occupies that entire building with its manufacturing plant and its offices with the exception of part of the stores. It has its manufacturing plant in the same building. My office is there. I am treasurer of the company, and have charge of the label department; that is a speciality of which I have charge. The business of the American Lithographic Company during the years 1901 and 1902 was general lithographic business and printing. They also did a business of making chromo pictures. A chromo is a lithograph, the same thing.

Q. Have you ever seen pictures like the Plaintiff's Exhibit G before?

A. I have not seen it before, nor one like it.

Q. What was the system of the American Lithographic Company during the years 1901 and 1902, with reference to keeping a record of the matters manufactured by it?

Mr. JENNER: I object on the ground that the witness is privileged from answering in view of the nature of the action, and is protected by the fourth and fifth amendments to the Constitution of the United States and under the general rule that in actions of this nature the defendant is protected from discovery by its officers, and that it might end to subject the witness to a penalty.

By Mr. JENNER:

Q. Mr. Ettlinger, you are a stockholder of the American Lithographic Company?

217 A. Yes, sir; I own several hundred shares of stock, and have owned several hundred shares ever since it was incorporated in 1892.

Mr. JENNER: I object also on the ground that it tends to subject him to a penalty as well as the company of which he is an officer.

The COURT: The objection is overruled.

Exception by defendant.

By Mr. KNAUTH:

Q. (Repeated.) What was the system of the American Lithographic Company during the years 1901 and 1902 with reference to keeping a record of the matters manufactured by it?

A. Well, the records are kept in the manufacturing department and in the auditing department.

Q. Who was in charge of the manufacturing department during 1901 and 1902?

A. Well, it depends upon what branch we were manufacturing. Each branch has got a different superintendent.

Q. Did you not also attend to the business of orders for advertising work?

A. No, sir.

Q. Who attended to that?

A. Mr. Donaldson, the vice-president of the company; he had charge of the general advertising business between 1901 and 1902—the color work. I remember a man by the name of Chapin. He was a salesman, I believe, in the commercial department, the department that does advertising work principally of all kinds, posters.

Q. How long have you known him to be a salesman for your company—in what years?

Mr. JENNER: I object to that on the same ground stated, as stated heretofore in respect to question- to this witness, without repeating them specifically here.

Objection overruled. Exception by defendant.

218 A. I suppose I have known him for about eight years past in the character of a salesman for my company. He is not now in the employ of my company.

The COURT: Let me see what that man did.

By the COURT:

Q. He solicited orders for lithographic work, did he?

A. He did; yes, sir.

Q. For the Lithographic Company?

A. So I understand. He was not under my jurisdiction.

Mr. JENNER: Then I move to strike out his answer. It appears to be his understanding only and not his knowledge. I move to strike out his testimony as to what Mr. Chapin did.

Motion denied. Exception by defendant.

Q. You knew him personally?

A. Yes, I conversed with him, perhaps, occasionally; saw him around the office.

Q. And you learned that he was doing that work? Who had charge of the payment of your employees?

A. The pay roll clerk.

Q. You were the treasurer. Didn't you have anything to do with it?

A. I get the amounts down and I order the payment.

Q. You knew the names, didn't you?

A. I would not look over the list. There are about a thousand names on there, and certainly he was a salesman then, and he was paid undoubtedly, or he would not have remained.

Q. Didn't you know as a fact that he was an employee of your company?

A. Yes, sir.

Q. You knew it yourself, didn't you?

A. Yes, sir.

Mr. JENNER: Is the motion denied?

The COURT: Yes, I deny the motion.

Exception by defendant.

The COURT: I guess he knows about it.

219 By Mr. KNAUTH:

Q. Have you told us who was in charge of that color department in 1901 and 1902?

Mr. JENNER: I want to except to your Honor's remark that you guess he knows it.

The COURT: Yes, except. He had charge of the pay rolls and this man was there.

Mr. JENNER: There were some 1,500 or 2,000 employees there, I understand.

The COURT: The Court expresses its opinion that he knew. It will be left to the jury whether he was employed or not.

Exception by defendant.

The COURT: The Court expresses its opinion and has a right to.

Exception by defendant.

Q. (Repeated.) Have you told us who was in charge of that color department in 1901 and 1902?

Mr. JENNER: The same general objection under the statute; the same constitutional objections are presented.

Objection overruled. Exception by defendant.

A. I do not know. Mr. Eddy is in charge of that department now, and I do not know when his term commenced in that department.

Q. Do you remember who was the foreman in the color department in 1901 to 1902?

A. Not in the commercial department, no.

Q. I am now speaking of the color department.

A. Yes, that color department is divided into—there are two foremen; one foreman attends to the label work and the other foreman attends to the general work on different floors, and they run different presses. The printing of an advertisement or poster
220 would not come into the label printing department, but into the general work department. I do not remember who was the foreman of that general work department.

Q. Or did your company in those years print any posters of the size and shape like Plaintiff's Exhibit G?

Mr. JENNER: Same objection.
Objection overruled. Exception by defendant.

A. Well, I suppose so. I do not know anything about the commercial work.
Q. You have seen posters of that size and shape in your business, have you not, printed by your company?
A. Yes.
Q. That is a familiar size to you, is it not?
A. No, not specially; no.
Q. You have seen advertisements printed by your company of that size and shape, have you not?
A. Approximately, I suppose. I could not tell.
Q. Had you the facilities for making posters of the kind like Plaintiff's Exhibit G?

Mr. JENNER: Same objection.
Objection overruled. Exception by defendant.

A. Yes, sir.
Q. And I take it that you had such facilities all through those years of 1901 on up to the present date?

Mr. JENNER: Same objection.
Objection overruled. Exception by defendant.

A. Yes, sir
I had nothing whatever to do with the getting up of designs for the purpose of printing chromo lithographs The art department was employed for that purpose, if anybody. I do not remember who was in charge of the art department in the years 1901 and 1902.
I suppose I could find it out from books which are in my
221 possession or which are in court. There were perhaps fifty people employed in the art department; it contained designers.
Q. Now, what was the practice of your company if anybody brought you a little woodcut or picture and asked you to make a chromo-lithograph, what would you do with it?

Mr. JENNER: I object to that.
Objection overruled. Exception by defendant.

A. I had nothing whatever to do with the manufacturing department, and unless I look these things up I could not tell who was the head foreman in 1901, from memory.
Q. Now, can you tell us whether the company kept any books in which orders for lithographic matter were entered in the years 1901 and 1902?
A. Supposed to be books. I do not know what they are doing in the commercial department at all; I have nothing to do with that department; I do not know what kind of books they do keep. I do not know what books are now kept for the purpose of taking down orders.

Q. Do you know whether any books were kept for the purpose of showing what went out of your establishment in the way of lithographic matter?

A. It is charged up in the day book what went out.

Q. In the day book?

A. That is the regular way of charging up.

CHARLES EDDY resumes the stand:

By the COURT:

Q. Now, Mr. Eddy, have you here this morning produced in court the books and papers, so far as you can find them, of the defendant company called for in the subpœna which was directed to you?

A. Yes, sir.

Q. Have you them here now in your custody?

A. Yes, sir.

Q. At this time?

A. Yes, sir.

222 The COURT: Now, if you want them, get them, because there is no question now.

By Mr. KNAUTH:

Please present the day books for the years 1901 and 1902?

Mr. JENNER: To save time and to avoid interruption, with your Honors consent and with the consent of the plaintiff's counsel, I will now state that I object to the production of the books. I object to the opening of them; I object to their being put in evidence or to any part of them being put in evidence, on the ground that the same is compulsory production by the defendant at the instance of the plaintiff, under your Honor's order, of books and papers in a *qui tam* action or an action for penalties, and that the obtaining of evidence in that way from the defendant is a violation of the defendant's rights under Section 724 of the Revised Statutes, and under the Fourth and Fifth Amendments and the Fourteenth Amendment to the Constitution of the United States. I will ask that it be understood and stipulated that that objection be taken to each and every question that may be put to the witness touching those books or their contents, and that an exception be allowed to the defendant, on the assumption that your Honor overrules the objection.

The COURT: Certainly.

Mr. JENNER: That is a matter of stipulation between counsel on both sides and the Court.

The COURT: There is not any doubt but that this is an action against this defendant, the American Lithographic Company—a corporation, as I understand it?

Mr. KNAUTH: Yes.

The COURT: To recover a penalty brought by this plaintiff in his own behalf and on behalf of the United States under the statute which gives penalty, one-half to the plaintiff and one-half to

223 the United States. Now, these are books of the company. There are officers of the company. They are here under a

writ of subpœna *duces tecum* requiring them to produce them. Now, as I understand it, the decision of the Supreme Court of the United States under the provisions of the Constitution protects them against unreasonable searches, but that the officers through such a writ cannot be compelled to produce the books and the papers of the company for such a purpose—I cannot see any difference.

Mr. JENNER: I do not understand and do not wish to agree to your Honor's statement that the books are here under a subpœna *duces tecum*. I want to claim that they are here under the service of a so called subpœna *duces tecum*, but they are mainly here under your Honor's order made last night.

The COURT: Very good; take it either way. They are here.

Mr. JENNER: The record shows that.

The COURT: Mr. Eddy is here and they are here. You can have all the objections.

Mr. JENNER: I do not intend to waive any right that the defendant has.

The COURT: It is understood—take it on the record—that the witness does not produce this book or any of these books voluntarily; he produces it because he is directed by the Court to do it, and he does it under protest and the defendant protests and objects.

Mr. JENNER: That is so.

The COURT: That will be the claim under all the objections. There is no repeating them over and over. The Court overrules the objection and gives you an exception and directs him to produce the book and gives you an exception to that. Now, what next? That will go right along to every question. Of course, do not stop to write it out—same objection, same ruling, same protest, and an exception; the same ruling, the same objection, the same protest, the same direction, and an exception.

224 Mr. JENNER: And I suppose the same procedure may apply without further expression to any other witness on the same subject?

The COURT: Certainly. You have to make — a record and you can put it in just as often as you think necessary, each and every one of them; if you think a general statement is not sufficient repeat it over and over again.

By Mr. KNAUTH:

Q. Have you made any examination of the day books which you have produced here with reference to discovering any entries relating to pictures like Plaintiff's Exhibit G?

Same objection, ruling and exception by defendant.

A. I have made an examination with reference — any pictures under the title of "Here's to Old English;" I have made such examination.

Q. Is that the only title under which you have searched for entries in your book.

Same objection, ruling and exception by defendant.

A. I had in mind the previous title, which, I understand, from the evidence given in court, this picture had, and I also disregarded an entry in regard to Old English Curve Cut.

Q. Now, will you tell us what entry, with reference to Old English Curve Cut, you found?

Same objection, ruling and exception by defendant.

A. Your Honor, there are about fifteen or twenty entries here; I should have to examine them all to answer that question.

225 By the COURT:

Q. What book is this now that you produce?

Same objection, ruling and exception by defendant.

A. Day book 3 of the defendant the American Lithographic Company.

Q. And do you find there a charge made in that book against the American Tobacco Company.

Same objection, ruling and exception by defendant.

A. Yes, sir; on page 45, under date of December 19, 1900.

By Mr. KNAUTH:

Q. What is the charge?

Same objection, ruling and exception by defendant.

The COURT: You want it in evidence.

Mr. KNAUTH: Yes.

The COURT: You offer that in evidence? You may read it so as not to put the book in and have that marked.

A. This is an abbreviated "Amer. Tob. Co."

Mr. JENNER: I suggest you never mind the abbreviations.

A. —

To Old Eng. Curve Cut Sketch. Original Sketch by Mr. Rumler		$150
Coloring by print by Mr. Blue	$5	
Original design purchased by Mr. Blue	50	
Lettering by Mr. Willing	15	$265

226 Q. Please let us know what is the next item that you find?

Same objection, ruling and exception by defendant.

The COURT: Give the page and the date and read them all so there won't be any question in the future.

A. Day book 5. Page 589. May 10, 1902. Now, your Honor, these abbreviations I will take for granted Eng. stands for English, Amer. for America, &c.

The COURT: Yes.

A. (Continued): American Tobacco Company.

417 c

The COURT: What does that "c" mean?
The WITNESS: I do not know, sir.
N L R Three bills
25 Old English Curve Cut hangers at 5c each (without any tubes) $1.25
25 tubes at 1½c .38 $1.63

There are some other words here and figures; I do not know whether they have reference to this. It says: "Office J 9033. 1Bdle. to City."

Q. What is the meaning of "Bdle"?

Same objection, ruling and exception by defendant.

A. Do you want my supposition?
Q. Yes.

Same objection, ruling and exception by defendant.

227 A. I suppose bundle; I do not know.
Same book, page 614. May 17, 1902.
American Tobacco Company.
307 c L N R 3 bills.
1000 show cards Old English Curve Cut, $50
Page 638. May 23, 1902.
American Tobacco Company.
417 c L N R 3 Bills.
50 Old English Curve Cut show cards, 5¢ each $2.50
(Select and tinned)
To tinning at $13. a thousand .65 $3.15
page 642. May 24, 1902.
American Tobacco Company.
417 c L N R 3 Bills.
Bill 5006—I do not know what that has reference to.
750 Here's to Old English hangers, at 5¢ each $37.50
Case 8110—I think that is simply how they were shipped, sir.
Tinning at $13 a thousand 9.75 $47.25
and then there is a freight charge of $2.81
page 646 May 26,
American Tobacco Company.
417 c L N R 3 Bills 7820
1200 Here's to Old English hangers 60.00
To tinning at $13. a thousand, 15.60 $75.60
Freight $2.60

(The Court on examining the book finds there are some things which the witness did not read.)

By the COURT: Go back and read the whole entry.

Same objections, ruling and exception by defendant.

A. Page 614. 1000 show cards—that item *there*—shipped to

Deuther Manufacturing Company. Not paid. J 9033, Buffalo N. Y.

228 That item on page 638 had a note at the foot 1 Pkge to Burroughs, 111 Fifth Avenue.

The entry on page 642 at the foot had a note Case

8110 250 to Charles Dushkind, City.

8111 500 to H. Heineyman, San Fran., Cal., via Sunset.

In regard to those names it says regarding, via Sunset, tin in parenthesis. J 9033 Frt. Chgd, in June, 1902, folio 36, book No. 6.

Page 643 May 24, 1902.

American Tobacco Company.

417 c L N R 3 Bills.

1500 Old English Curve Cut show cards at 5¢ each $75.

Shipped to Deuther Manufacturing Company, Buffalo, N. Y.

Not paid.

Case 5365. Via. D. L & W. J 9033

By Mr. KNAUTH:

Q. What is the meaning of not paid?

Same objection, ruling and exception by defendant.

A. I do not know.

Now the foot note to 646. S U Case No. 8113

500 to D. H. Hall, St. Louis, Mo. $1.22

Ditto under the S. U. 8114

200 to M. V. Shallcross, Louisville, Ky. .75

P R R 8117

500 to S. S. Goodloe, Pittsburg, Pa., .63 J 9033

Page 652, same book. May 27, 1902.

American Tobacco Company.

417 c L N R 3 Bills 8335

1300 Here's to Old English hangers at 5¢ each 65

Tinning at $13. a thousand 16.90

Freight 1.45 $81.90

229 Then this freight is itemized and extended separately.

Case 8124.

-0 to Ira Stover, Chicago, Ill., via S. U. .98

8125

500 to E. S. Dusel, Boston, Mass., via Met. .29

8126

300 to H. K. Ramsey, Bound Brook, N. J., N. J. C. 18 $1.45

J 9033

Page 661 May 29, 1902.

American Tobacco Company.

417 c L N R 3 Bills 6446

1000 Here's to Old English at 5¢ each 50.00

To tinning 13.00 $63.00

Shipped to A. J. Fitzsimmons. Frt. 146 J. 9033
Cleveland, O. Case No. 8135 Via S U P.
Page 667 May 31, 1902.
American Tobacco Company.
417 c L N R 3 Bills
3 Show cards Here's to Old English
at $1.67 ea. 5.01
(Mounted on satin) deld. to City
Day book No. 6, page 17. June 3, 1902.
American Tobacco Company.
417 c L N R Page 6/19
1000 Here's to Old English hangers at 5¢
each 50.00
to tinning at $13. a thousand $13.00 $63.00
Deliver to Charles Dushkind. City
(Tinned) Case No. 8144 2 Pkgs.
Page 30 June 6. 1902.
American Tobacco Company.
417c 3 Bills L N R 3233 Page 619
500 Here's to Old English hangers at 5¢
each 25.00
Tinned at $13. a thousand 6.50 $31.50
Shipped to C. C. Heldman. Detroit. Mich.
230 Frt. .83 J No. 9033 Case No. 8161 via Lack.
Paid.
Page 36 June 7. 1902
American Tobacco Company.
5/24 417 c L N R Bill 5006
To freight charges on 500 Here's to Old English
hangers shipped 52402 2.81
J 9033 Case 8111
Page 78 June 19. 1902. 3 Bills.
American Tobacco Company.
417 c L N R 1335
200 Old English Curve Cut hangers at 5¢
each 10.00
To tinning $13. a thousand 2.60 $12.60
Shipped to M. B. Shalleross 75¢ J 9033 Louisville. Ky.
Case 8212 vua S u Paid.
Page 83 June 20. 1902. 3 Bills.
American Tobacco Company.
417 c L N R
100 Here's to Old English cards
(No lettering and no tinning)
at 5¢ each
Delivered to Mr. Wilson Order J 9033
111 Fifth Avenue.
Page 131 June 30. 1902. W A S 417 c
American Tobacco Company.
10 Old English Curve Cut show cards
Mounted on satin at 1.67 each 16.70
10 tubes at 2 cents each .20 $16.90
Delivered to Mr. Wilson J 9033.

Q. Are these all the entries of this kind which you have been able to find in the day books produced by you?

Same objection, ruling and exception by defendant.

A. Yes, sir.

231 Q. Can you produce the ledgers in which these entries were posted?

Same objection, ruling and exception by defendant.

A. I have the ledgers between the periods, sir.

Q. Will you please look at those ledgers?

Same objection, ruling and exception by defendant.

(The witness leaves the stand and returns with three books.)

Q. Now look at the entries on page 17 of the ledger produced by you, which is marked on the back thereof, "Ledger A to L, No. 2, A. L. Co." Can you state whether the several items commencing with July 17, 1901, which you have just testified to, were carried over in to this ledger?

Same objection, ruling and exception by defendant.

A. I cannot so testify from knowledge that I have at the moment, sir.

Q. Will you look at the account and compare it with the list of items?

Same objection, ruling and exception by defendant.

A. The item of May 10, 1902, on page 589, in day book No. 5, amount $1.63. There is an item posted in the ledger under that date, page 25, ledger A to L, No. 2, for $1.63, under that date, May 10, 1902.

Q. Now, will you please make the same comparison with reference to the subsequent entries, all of them?

Same objection, ruling and exception by defendant.

A. The next one is on page 614, under date of May 17, 1902. $56. Such an item is posted in the ledger on the same page.

232 By the COURT:

Q. Don't the ledger refer back by figures or anything to the day book?

Same objection, ruling and exception by defendant.

A. It gives the page number; yes, sir.

The next item is on page 638, under date of May 23, 1902, amounting to $3.15. Such an item is posted to page 26 of the ledger.

The next item is on page 642 of the day book, which amounts to $47.25.

Another item of $2.81, which I presume is freight.

That item of $47.25 was correctly posted on that page. They seem to have omitted it at that time and to have inserted it later.

Q. They are both posted?

Same objection, ruling and exception by defendant.

A. They both got in there, yes, sir.

An item of May 24, of $75, posted to page 26 of the ledger.

Page 646, May 26, 1902, item of $75.60 and $2.60 for freight. That is posted as one item, $78.20 on page 26.

Page 652, May 27, 1902, $81.90, and $1.45, which is freight, that is posted as one item of $83.35 on page 26.

Page 661, May 29, 1902, an item of $63 and $1.46 for freight. That is posted on page 26.

Page 667, May 31, 1902, item of $5.01. That is posted at page 26.

Day book No. 6, page 717, June 3, 1902, item of $63. It is posted at page 215 of the same ledger.

Page 30, June 6, an item of $31.50, and 83 cents freight. That is posted as one item at page 215.

Page 36, June 7, 1902, an item of $2.81 for freight. I find that item on page 26.

233 Page 78, June 19, 1902, an item of $12.60, and another item of 75 cents. That is posted as one item at page 215.

Page 83, June 20, 1902, there is an item of $5. That is posted on page 216.

Page 131, June 30, 1902, an item of $16.90. That is posted on page 216. That is all, sir.

Q. You find they were all carried in the ledger?

Same objection, ruling and exception by defendant.

A. All carried in the ledger, sir.

By Mr. KNAUTH:

Q. Will you please look on the other side of the ledger account and tell us whether these several items which you have read therefrom are marked as paid for by the American Tobacco Company?

The COURT: Whether the American Tobacco Company is credited with having paid for them on the books of this defendant?

Same objection, ruling and exception by defendant.

By Mr. KNAUTH:

Q. Beginning July 17, 1901, that is, two years before the action was commenced.

Same objection, ruling and exception by defendant.

Mr. KNAUTH: July 17, 1903, that was the date of the summons in this action.

A. The amounts on the credit side do not seem to correspond with the amounts on the debit side. I do not think I could trace each item in that way. For instance, this first charge $1.63 on May 10, 1902, I do not find the credit of $1.63.

234 By the COURT:

Q. Well, you may give the credits that do appear, credits given

by the American Lithographic Company to the American Tobacco Company? Read the dates and the credits?

Mr. KNAUTH: After the date of July 17, 1901; yes; after the first charge; commence with the date of the first charge and give the credit.

Same objection, ruling and exception by defendant.

A. Your Honor has asked for one thing and the counsel for the other. Which shall I follow?

The COURT:

Q. You say, I understand, that you cannot find the credits. If you will read off those credits so far as they do correspond, they will speak for themselves; and so far as they do not correspond, why, it might be a question whether something else was not charged in. It might be that it was not all paid for, and it might be other things were included.

Same objection, ruling and exception by defendant.

A. Then I am to read the credit side from July, 1901?

Q. Yes; read them all off. That is what is competent, anyway, those credits that appear on those books. That is evidence; some evidence, at least, that the American Tobacco Company paid those amounts to the American Lithographic Company; that is the evidence.

Same objection, ruling and exception by defendant.

A. You simply want the items without what they refer to?

Q. Do they show?

Same objection and exception by plaintiff.

235 A. Some say by cash and some say by other things.

Q. Can't you say whether these have anything to do with this?

Same objection, ruling and exception by defendant.

A. I cannot say whether they have or not. I can go on to the point where the ledger balance-, if you want that.

Q. Begin with the date he wants.

Same objection, ruling and exception by defendant.

A. May 10, 1902, 129.12; May 13, 416.11; May 15, 2,101.58; May 20, 3,668.97; May 22, 393.92; May 27, 152.49; May 21, 78.34; May 22, 38.05; May 29, 79.64; June 3, 41.98; June 5, 235; June 7, 346.71; June 12, 813.54; June 14, 353.16; June 7, 45.96; June 9, 693; June 18, 34.87; June 18, 307.19; June 19, 3,848.92; June 19, 720.36; June 20, 105.52; June 24, 513.29; June 27, 1,127.11; June 30, 318.06; July 3, 889.66; July 3, 904.30; July 7, 17.09; July 9, 182.53; July 10, 655.06; July 11, 182.68; July 14, 50.50; July 16, 81.40; July 16, 219.41; July 16, 3,335.34; July 18, 1,012.12; July 23, 207.70; July 25, 721.41; July 29, 1,122.47; August 2, 20.54;

August 6, 3,420.88; August 8, 5,098.47; August 9, 2,821.38; August 13, 1,042.55; August 15, 2,191.11; August 15, 649.02; August 19, 51.48; August 20, 1,099.93; August 22, 826.59; August 22, 10; August 26, 657.76; August 26, .06; August 23, 40; August 28, 320.50; August 29, 791.53; September 1, 338.98; September 5, 1,099.27? September 9, 539.65; September 10, 3,506.54; September 11, 1,295.75; September 15, 790.42; September 19, 654.35; September 20, 50.06. September 20, 5.00; September 20, 16.90; September 26, 840.83; October 1, 1.07; October 2, 2,150.09; October 8, 10.08; October 9, 652.66; October 14, 64.86; October 17, 1,351.16; October 18, 2,635.16; October 24, 1,096.66. October 24, 2,276.49; October 24, .10; October 30, 14.70; October 31, 2,010.23; Oc-
236 tober 31, 11.78; November 6, 68.63; November 7, 38.75; November 7, .20; November 7, 1,218.55; November 11, 997.37; November 13, 270.76; November 13, 918.76; November 14, 470.50; November 19, —; November 21, 300.87; November 28, 339.30; December 5, 856.06; December 9, 234.74; December 11, 590.; December 12, 24.60; December 19, 619.08; December 23, 855.20; December 24, 1,253.86; December 30, 402.19; December 31, 10.75; December 31, 1,493.38; December 31, 30.

Q. When was the account balanced after May 10, 1902?

Same objection, ruling and exception by defendant.

A. A balance was struck June 30, 1902. The balance was then carried forward.

Q. How much was it then; what balance was carried forward?

Same objection, ruling and exception by defendant.

A. $9,123.64. That amount was still owing by the American Tobacco Company to our company. The next balance was December 31, 1902. The balance then was $1,260.05. It says by balance to some other ledger.

Mr. KNAUTH: What was the next balance?

The COURT: He has got to get the other ledger.

Same objection, ruling and exception by defendant.

A. The balance brought forward was $1,260.05. The next balance seems to be on June 30, 1903, $13,362.31.

By the COURT:

Q. Give the next one. I do not see that that is helping it out except inferentially. They do not seem to have paid up in full.

Same objection, ruling and exception by defendant.

237 A. Balance December 31, 1903, $16,947.45. Balance on June 30, 1904, $872.27.

Q. Are you able to tell, could you testify whether or not these payments that were made—in the first place, of course, there were other dealings between the two companies as shown by the books?

Same objections, ruling and exception by defendant.

A. Yes, sir.

Q. And there was other indebtedness of the Tobacco Company to your company. Is there anything there that enables you to tell whether these payments along down to this last date you mention when there was a balance of about $800, whether those payments were made generally on account or whether they were for specific items of the indebtedness?

Same objection, ruling and exception by defendant.

A. No, sir.

Q. What is your next balance? See if you can find one.

Same objection, ruling and exception by defendant.

A. We are up to December 31st—no, that was June 30, 1904. Yes, there is one more balance after that. On December 31, 1904, balance $71.57.

The COURT: I guess you have evidence now of what was paid for, most of it anyhow. They paid it all down to that, that and other matters.

By Mr. KNAUTH:

Q. Have you any other books in court, Mr. Witness, relating to this matter?

Same objection, ruling and exception by defendant.

238 A. No, sir.

Q. Have you brought with you any correspondence between the American Lithographic Company and the American Tobacco Company with reference to this matter?

Same objection, ruling and exception by defendant.

A. No, sir.

Q. I suppose the books you have produced, the ledgers and the day books, are the ordinary books kept of accounts of the defendant company?

Same objection, ruling and exception by defendant.

A. Yes, sir.

Q. And so far as you know they were correct?

Same objection, ruling and exception by defendant.

A. Yes, sir.

Q. I suppose you have occasion to refer to them from time to time your business?

Same objection, ruling and exception by defendant.

A. I do not remember that I ever looked at them before, sir.

Mr. KNAUTH: That is all of this witness.

The COURT: What next?

Mr. KNAUTH: That is our case, if your Honor please.

[Plaintiff rests.]

Mr. JENNER: I move to dismiss the complaint or for the direction of a verdict for the defendant on the grounds:

First. That the plaintiff had no statutory right to take the copyright alleged in the complaint, he not being authorized under
239 Sec. 4962 of the Revised Statutes to take the copyright, not being the author, inventor, designer or proprietor of the painting, nor the assigns of such person.

Second. On the ground that the plaintiff has no right to maintain the action on the copyright because neither the painting nor the substance on which the same was mounted was inscribed with the notice required by Sec. 4962.

Third. On the ground that plaintiff has no right to maintain the action on the copyright because the painting was published both by public exhibition of the painting itself and by the publication of photogravures of it, and neither the painting nor the substance on which the same was mounted was inscribed by the notice prescribed by Sec. 4962.

Fourth. On the ground that there is no evidence in the case of any copies of the painting which were in the possession of the defendant or by it sold or exposed for sale within the meaning of Sec. 4965.

Fifth. On the ground that there is no evidence of any copy of the painting as distinguished from photographs or photogravures having been in the possession of the defendant or by it made, sold or exposed for sale.

Sixth. On the ground that the allegations of the complaint have not been proved, and that the defendant has not been shown guilty and liable to penalties of forfeiture.

Seventh. No evidence that any of the alleged infringing sheets were made, worked, printed or copied by defendant since July 17, 1901; that the cause of action, if any, accrued by reason of
240 the copying, printing or working, and there is no evidence that this was within two years from July 17, 1901.

Motion denied. Exception by defendant.

The COURT: What next?

Mr. JENNER: I do not care to submit any evidence.

[Defendant rests.]

Mr. KNAUTH: I move for a direction of a verdict for the plaintiff.

The COURT: I do not think the evidence here would justify that. I cannot direct a verdict. You will have to go to the jury.

Exception by plaintiff.

The COURT: The penalty is $10 for each copy, isn't it?

Mr. KNAUTH: Yes.

The COURT: Go to the jury if you desire. It is for the jury to say, isn't it? They are to say whether it is a copy, and they are to say whether under this evidence the Lithographic Company printed it, and they are to say whether they sold them and how many they sold. Isn't all that for the jury? Do you desire to address the jury?

Mr. Jenner sums up for the defendant.
Mr. Knauth sums up for the plaintiff.
The Court charged the jury as follows:

Charge.

The COURT (RAY, *J.*):

Gentlemen of the Jury, this action is brought by the plaintiff against the defendant The American Lithographic Company to recover penalties, speaking in common parlance, for the violation of his copyright of a painting.

241 The statute, after providing for the taking out of copyrights of paintings, books, &c., and works of art, and providing the term for which they are good, for which the owner of the copyright is to have the exclusive right to them, the use of them, provides:

"If any person, after the recording of the title of any map, chart, dramatic or musical composition, print, cut, engraving, or photograph, or chromo, or of the description of any painting, drawing, statue, statuary, or model design intended to be perfected and executed as a work of the fine arts, as provided by this Act, shall, within the term limited, contrary to this Act, and without the consent of the proprietor of the copyright first obtained in writing signed in presence of two or more witnesses, engrave, etch, work, copy, print, publish, dramatize, translate or import, either in whole or in part, or by varying the main design, with intent to evade the law, or, knowing the same to be so printed, published, dramatized, translated, or imported, shall sell or expose to sale any copy of such map or other article, as aforesaid, he shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale; and in case of a painting, statue or statuary, he shall forfeit ten dollars for every copy of the same in his possession, or by him sold or exposed for sale; Provided, however, That in case of any such infringement of the copyright of a photograph made from any object not a work of fine arts, the sum to be recovered in any action brought under the provisions of this section shall be not less than one hundred dollars, nor more than five thousand dollars, and: Provided, further, That in case of any such infringement of the copyright of a painting, drawing, statue, engraving, etch-

242 ing, print, or model or design for a work of the fine arts or of a photograph of a work of the fine arts, the sum to be recovered in any action brought through the provisions of this section shall be not less than two hundred and fifty dollars, and not more than ten thousand dollars. * * * One-half of all the foregoing penalties shall go to the proprietors of the copyright and the other half to the use of the United States."

This plaintiff contends that there was a painting, a work of art in England which has never been brought to this country, and

that he purchased of the owner of that painting the right to copyright it, and that he took an assignment of that right, and that he did copyright it in the United States under our laws, and that he paid the fee, filed the description with a photograph of the original painting with the Librarian of Congress at Washington, and that copyright has been put in evidence and the picture has been put in evidence before you of what he did copyright; what the copyright was taken out on; you have seen it; there it is

Now, gentlemen, I think it is my duty to say that inasmuch as the witnesses who have made depositions in this case are not in any way contradicted or disputed, or their integrity or interest questioned, that the evidence shows that this photograph was a true and correct photograph of the painting, and the evidence shows that the right to copyright it was duly assigned, and that the copyright is in due and legal form, and that it is a valid copyright owned by the plaintiff of that painting.

Now, the first question of fact is, did the defendant here make an etching, print or a copy of that copyrighted painting. You have seen them; you have compared them. Is one a substantial copy of the other? It is immaterial that they have added something, put it in different form; that the one is a chromo and the original is a painting; it is not the paint that is the subject of the copyright, but it is the picture, what you see. Now, I will sub-
243 mit that to you, is that a copy, and it is immaterial that they have added words to it, or that they may have varied it in some other slight features, or taken off a little bit of the original so as to make it a little smaller, or something of that sort; substantially, as a whole, is it a copy of that copyrighted painting? Is this the one that was made, the one that is in evidence?

If you are satisfied of that, then the next question is did the defendant here, the American Lithographic Company, by its men having charge of that work, did it make those copies or cause them to be made? Now, you have heard the evidence here that the defendant, the American Lithographic Company, is engaged with apparatus, machinery, &c., and workmen for making such chromos and such pictures to supply the trade in making chromos, pictures, &c.; that they have the facilities for doing it. Then they had a salesman who has been spoken of here as in their employ whose duty and business it seems it was to solicit orders and to make sales. Of course I will leave to you the question, was that his business? Did defendant have such a man under this evidence going to support that theory and contention, and was he engaged in that work and in that business for the American Lithographic Company? The plaintiff contends that after consultation with some of the officers and representatives of the American Lithographic Company, that person proposed and agreed, being authorized thereto, the contention is, by the American Lithographic Company, to make these pictures like Exhibit G, which the plaintiff put in evidence, at an agreed price for the American Tobacco Company; and you have heard the evidence as to the interviews of that salesman of the defendant and the representative of the American Tobacco Com-

pany back and forth, the making of prints by somebody, and as to that salesman of the defendant going and talking with the representatives of the Tobacco Company and passing back
244 and forth until finally the picture was made satisfactory and like this one in evidence, without perhaps the printing on it, which is immaterial.

Now, there is some evidence tending to show that this agent, representative or salesman of the defendant was engaged in making an agreement and an engagement for the defendant to make, print or publish and sell or make, print and furnish those prints or hangers, or whatever they call them, advertisements, which have taken the name which is printed on them to the Tobacco Company. Now, there is evidence, and you have heard it, that subsequently the plaintiff here, through its representatives and agents and attorneys, went to the office of the American Lithographic Company and there found some two or three hundred copies—you have heard the number—like Exhibit G, copies of that copyrighted picture in their possession, and you have heard some evidence here as to the finding of other copies in Buffalo with certain people who have been described. Now, there is evidence as to the actual existence of certain of these copies, amounting to several hundred. Now, who made them, who printed them, who sold them? Was it the American Lithographic Company that made them, under this evidence, and did they sell them to the American Tobacco Company, and did they deliver some there to the Tobacco Company at its place of business? That is for you to say. You are sworn to decide the case on the evidence. You have no right to speculate or guess, but you are to decide it on the evidence, as the evidence satisfies you.

Now, after a long contest here and the taking of considerable evidence, the main part of which, under some circumstances would be immaterial, it has been for the information of the Court to get at other facts and circumstances, and not for you in getting at those questions which are submitted to you, the defendant has submitted its books of account, its daybook and its ledger, and from
245 those books we get the information that at a time subsequent to these negotiations or dealings, whatever they were, between the salesman of the defendant and the representatives of the Tobacco Company, that there was charged by the Lithographic Company, the defendant, to the American Tobacco Company, certain of these copies having this name, and you have heard the number described; it runs along up, I think, into the thousands—at least into the hundreds; you heard the evidence, and it is for you to say. There they are charged to the American Tobacco Company, and then you find credit, at least, on account. The evidence of these credits appearing on the books do not show that they correspond specifically, but there are the credits running down somewhere into 1904, and you have heard the evidence that they had other dealings. Of course, you will find that the whole account, including the charge for these pictures which are described in the books, the same name, I think, as this in evidence, substantially, that it is all paid except some $50 or $60; you have heard the amount.

So the plaintiff here contends that he has shown you not only negotiations between the defendant and the American Tobacco Company, whereby the Lithographic Company was to make these pictures which are, he contends, copies of the copyrighted painting, and in violation of that copyright and payment therefor, but that their agent brought back and forth samples of the work, and it was finally agreed upon and then plaintiff claims that certain orders were made out—although the evidence has not shown an explicit delivery of the order that was sent down to one of the departments of the Tobacco Company to the American Lithographic Company—but the plaintiff contends that under the whole evidence that you should find and are compelled to find that that order did go to the defendant company, and plaintiff says that is justified from the fact that the agents and representatives of the two companies
246 were talking back and forth about it; and now the books show, plaintiff contends, that the American Lithographic Company has charged for these copies to the American Tobacco Company, and that its books show that it has been paid for them by the Tobacco Company. That the Lithographic Company was paid for such copies by the Tobacco Company, and plaintiff says a part of the copies, several hundred, have been found in the possession of the Tobacco Company and others at Buffalo, and they also say that these books of the defendant show that some of these pictures, like Exhibit G, were sent to different parties and to the parties in Buffalo, as well as to other places; and, therefore, the plaintiff says, taking this with some other evidence, that he establishes beyond any doubt, beyond any reasonable doubt, not only that the defendant made these copies, these pictures which you have seen here, but establishes that it actually sold them and delivered them, or caused them to be delivered to the number of several thousand copies; to the number of at least one thousand copies; and he says if that is so, if you so find, and the plaintiff says the evidence compels you to so find, and you cannot find otherwise, he has made out his case. Plaintiff says if that is so you have then but one question remaining, which is to find the penalty, which is fixed by the law at $10 for each of the separate copies made and sold by defendant; and, as his claim is limited to one thousand copies, that that would permit plaintiff's recovery of the sum of $10,000, and he claims to recover one-half for his own benefit and the other half for the benefit of the United States under this statute.

Now, gentlemen, I will say to you that with the policy or the wisdom of this law you have nothing whatever to do. Some of you may think that such a law—the policy of it, the wisdom of it—is doubtful; that it is rather stringent in its provisions. You have the right to entertain those beliefs, those opinions, if you do,
247 for you cannot help it. I may have impressions of that kind; but that does not vary the law. There is the section; it is an act of the Congress of the United States, and if it has been violated by the defendant, and that violation is established by the evidence to your satisfaction under the rules of law which I will give you, why, then, as sworn jurors under your oaths, it is your

duty to enforce it and find a verdict according to the evidence, whether you approve or disapprove of the statute itself; that is, no good juror, under his oath, is justified in refusing to find a verdict when the evidence as he believes it to be demands one, simply because he does not believe in the wisdom or policy of the statute; that is what I mean to say.

Now, gentlemen, the burden of proving this alleged cause of action is on the plaintiff. It is an action for a penalty; it is not a criminal action; it is not a criminal prosecution; it is a civil action; but still it is, as the law calls it, *quasi*-criminal in its nature and in its aspects; and so the law demands of the plaintiff not only that he prove his case by a preponderance of evidence, but that he prove his case by a preponderance of evidence, and by such an amount of evidence that it amounts in effect to sustaining his contention beyond a reasonable doubt; that is, he must prove his case with certainty, so that you can say that it is established; the evidence must be clear, satisfactory, concise and conclusive; that is the rule. It must in effect satisfy you beyond a reasonable doubt of the truth of the contention of the plaintiff; that is, that this defendant here made these pictures and exposed them for sale, or made and sold them, or that it made them and caused them to be sold and delivered by some one in their employ to the American Tobacco Company. The evidence must be clear and satisfactory, and the burden amounts, under that rule, to the establishing of that fact beyond a reasonable doubt. Now, gentlemen, what is a reasonable
248 doubt? A reasonable doubt is not a surmise, a guess, a speculation, a theory.

Reasonable doubt may arise from the insufficiency of the evidence. Reasonable doubt whether t— was done may arise from a lack of evidence. There must not be an arbitrary refusal to believe the credible evidence, but reasonable doubt must be a doubt arising from either the inconclusiveness or the uncertainty of the evidence adduced or given, or the fact that the evidence given is incredible or unworthy of belief and self-contradictory, and is this evidence here of that character? You have here the evidence given by the defendant itself; you have here the dealings of the salesman of the defendant with the representatives of the American Tobacco Company, and that has not been directly contradicted; nobody appears to deny it. You have here the prints and the pictures which speak for themselves and the payment for them. So what is the fact in that regard? That is for you to say and for you to determine in this case; and then you are to say how many copies were made, how many were sold or offered for sale. Of course the making and the selling of them or exposing of them for sale must have preceded the time when this action was brought, and within two years of that date, and if the defendant made them and if the defendant sold them, or exposed them for sale and delivered them, got pay for them, why, I think there is no dispute here materially in the evidence that the most of it was done prior to the bringing of this action; but that is a mere suggestion. You have heard the evidence and you will find that fact for yourselves.

Now, gentlemen, I am requested here by the defendant to charge certain propositions:

"1. Plaintiff must prove under Section 4965 either that the defendant engraved, etched, worked, copied, printed or published or imported the specific incriminating sheets in respect of which recovery for penalties is sought."

249 Yes, the plaintiff must have proved that the defendant engraved, or etched or worked or copied or printed or published the sheets that have been referred to like this, the ones here; that is true. I so charge.

"2. Or the plaintiff must prove that the defendant sold or exposed for sale the specific incriminating sheets, and in addition, plaintiff must prove that such sale or exposure for sale was with knowledge by the defendant that such specific sheets had been printed, published, or imported without the consent of the proprietor of the copyright."

There is no question of importation; there is no pretense of it. That is true. If defendant did engrave, etch, work, copy, print or publish these, why, then, in accordance with this request, plaintiff must prove that the defendant exposed for sale these incriminating sheets, that is, these sheets in question, without the consent of the proprietor of the copyright. That is true, gentlemen. You have heard the evidence here as to consent. You will say whether it is true or not. Is there any evidence here to establish that?

"3. The section of the statute under which the plaintiff seeks to recover is a penal statute in that it fixes an arbitrary measure of recompense to the plaintiff irrespective of the damages which he may have actually sustained, and irrespective of the profits which the defendant may have actually realized, and in the further provision that one-half of the amount recovered shall be to the use of the United States. It makes no pretense of awarding damages and simply imposes a forfeiture of a specified sum."

That is true, gentlemen, decidedly. Of course you are not to refuse to find a verdict, however, because this does not pur-

250 port to fix the damages that the plaintiff may have sustained, and I leave that to you. Congress has the right to pass such a law. The law if made to be respected and should be obeyed, and respected by courts and by juries. The question here is, has that statute been violated by this defendant in the respects named, and are you satisfied of that beyond a reasonable doubt, that is, does the evidence satisfy you beyond a reasonable doubt?

"4. The section referred to (Sec. 4965) must therefore be construed strictly, and the plaintiff must be held to a strict proof of the allegations essential to entitle him to recover."

I so charged, and I think I stated it with more emphasis than that.

"5. The defendant is entitled to the benefit of every reasonable doubt."

I accept that; that is, it is entitled to every reasonable doubt in getting at the question whether or not it printed and sold or published, and sold or offered for sale. If the evidence is not satisfactory

and conclusive, but leaves it doubtful, why, then you are to give the defendant the benefit of that doubt, because it is the duty of the plaintiff in an action for a penalty to establish a violation of the statute beyond a reasonable doubt, that is within the definition I have given you.

"6. How much damage, if any, the plaintiff may have sustained, and how much profit the defendant may have made from the defendant's alleged infringement are not questions for the consideration of the jury, and should not influence their determination of other questions which are submitted to them."

That I have said.

"7. The facts that the American Tobacco Company had in its possession certain alleged infringing sheets, and that there
251 had been dealings between the Lithographic Company and the Tobacco Company, if you find that such facts are established by the evidence, do not necessarily of themselves prove that the defendant etched, worked, copied, printed, published or imported those sheets, or that it sold or exposed them for sale."

Oh, that is true. The fact that the Tobacco Company had the possession of them, and the fact that there had been dealing between the Lithographic Company and the Tobacco Company, those two facts, standing alone, gentlemen, would not prove anything; they would not establish anything if that was all there was of it. But here you have the negotiations back and forth about the pictures, the making, if it is true, of course—I am not saying it is true; it is for you—and the negotiations and the passing of the proofs back and forth, that is, the possession of the prints and the pictures by the Tobacco Company, the orders that they gave set down to one of their departments, then the charge for these prints under this name by the defendant to the Tobacco Company, and the payment on that account by the Tobacco Company, or in connection with their other transactions and this all together is a different thing; and I will say to you right there that the mere fact that the Tobacco Company had the possession and the companies had dealings, that would not establish anything if that stood alone.

"8. The possession of those sheets by the Tobacco Company is consistent with an assumption that they were made by some other lithographer than the defendant, or with the assumption that the defendant was concerned with them only in a supervisory capacity without having done the manual work which resulted in their production."

Well, I would say, gentlemen, that the possession alone would be consistent. Of course the mere possession by the American
252 Tobacco Company would be perfectly consistent with the fact that they were made by a lithographer. If that stood alone I would say to you that it would prove nothing except the American Tobacco Company had them, and if it was proved to be a copy it would not connect the defendant with it. To connect the defendant with it you have the other evidence in the case, which is the books and the other facts to which I have called your attention.

I think I have covered the other requests. That printing or

offering for sale must have been done within the two years preceding the commencement of the action, which was on the 17th day of July, 1903, I say it must have been done since the 17th day of July, 1901; that is true, gentlemen.

Mr. JENNER: I except to your Honor's charge in the respect that you charged that Chapin was authorized to take orders of the defendant to make pictures. There is no evidence of that in the case.

The COURT: There is evidence, I say, to that effect; it is for you to say; there is some evidence to that effect, but you say what the evidence was. You have heard the evidence of the officers of the defendant company in that regard. I leave that to you. I am not deciding the question of fact; I am leaving that to you. It is for you to say under this evidence was that true or was not that true.

Mr. JENNER: I except to your Honor's qualifications in that respect.

I will ask your Honor to charge that there is no evidence in the case that the name or term "Old English Curve Cut" was applied by the defendant or by the witnesses who are officers of the company only to the chromo of which Exhibit G is a specimen.

The COURT: I decline to charge that proposition.

Exception by defendant.

The COURT: You have heard the evidence here as to the negotiations, what they were, and the name they gave it, and the
253 name that was put on the chromos that were sent out, and the name that appears in the charges by the defendant. Was it this picture or was it some other picture, under that evidence? Was those charges for this picture or some other picture? What is the natural reasonable inference? It is for you to say, and for you to determine. If that picture that they refer to there in their books of account was some other picture, and not a copy of this painting, then it would not have any cogency at all. That evidence you are to take and consider, and it is for you to say whether it meant this one, or did it mean something else?

Exception by defendant.

Mr. JENNER: I ask your Honor to charge there is no evidence in this case and no evidence from which an inference of the quality which is required in actions of this nature, that the entries made in the day book and ledger and read in evidence have reference to pictures like Exhibit G.

The COURT: Oh, that is for you to say gentlemen.

Exception by defendant.

Mr. JENNER: I ask your Honor to charge that there is no connection between the defendant's books and the pictures found at the Tobacco Company.

The COURT: No connection between them?

Mr. JENNER: Between the defendant's books and the pictures found.

The COURT: In some senses that is true, but in the sense that one refers to the others and the charges in the books which you have heard read here, and which have been produced here, are charges for this picture or copies of it, is that not true, gentlemen? Is it for

anything else? Is there any evidence here that indicates anything to the contrary? Aided by your common sense, take all this evidence together, take it into consideration, all those talks and the production of those samples, and what were actually there
254 with the Tobacco Company, take it all together, those facts, and determine whether the charges in the books were for pictures like this. Of course the fact that some were on paper and some were on silk is not material.

Mr. JENNER: I except to your Honor's qualification of the charge.

The COURT: Some have different legends.

Mr. JENNER: And I also except to your Honor's refusal to charge to two requests, which are numbered 9 and 10.

The COURT: 9 and 10 I have not refused to charge.

Mr. JENNER: You charged one of them in part. The other I think you said you had already charged.

The COURT (reading): "10. No evidence that any of the alleged infringing sheets were made, worked, printed or copied by defendant since July 17, 1901, that the cause of action, if any accrued by reason of the copying, printing or working and there is no evidence that that was done since July 17, 1901, or within two years of commencing the action, as alleged in the complaint, paragraph 'Tenth.'"

Do you claim there could not have been a cause of action here for exposing for sale?

Mr. JENNER: According to my claim it is the working, copying and printing, and that must have been done prior to July 17, 1903. There is no evidence that it was.

The COURT: In that construction I think that is so. Of course it is for you to say if there is evidence here. There is evidence here as to when they were talking about making them and when they came back and forth.

Mr. JENNER: That evidence is of December, 1900.

The COURT: That is all true, but what occurred after that, there is evidence, gentlemen, that it ran along for a long time. Then when they got to delivering and sending them out, that is for you to say.

"9. That plaintiff must prove that defendant copies the painting—variation of the main design is not within the pleadings."
255 Mr. JENNER: There is no allegation in the complaint that the defendant varied the main design. We are charged with copying the painting.

The COURT: You have heard the evidence. Did plaintiff, or did the plaintiff not, make a copy of the painting, and then did plaintiff or did he not, take out a copyright on that painting, and then did or did not the defendant copy that copyrighted thing and sell such copies? It is all for you to say.

Mr. JENNER: I take several exceptions to your Honor's refusal to charge.

The COURT: I charged them with those explanations and additions.

Mr. KNAUTH: I ask your Honor to charge that there was evidence of an indemnity agreement executed by the American Litho-

graphic Company to the American Tobacco Company with reference to these posters, which agreement, according to the testimony of the witnesses, has been lost.

The COURT: You have heard that evidence, gentlemen, as to the execution of the indemnity agreement protecting the American Tobacco Company against any claims made against it for violating the copyright, and there is evidence here which would justify you in saying that there was such an agreement. You have heard those witnesses state what there was about it, whether there was an agreement drawn up, and you have heard one of the representatives of the defendant say what he required and what was agreed to be done, and what was it? Now, of course, if that was done and there was such an indemnity as that, why, it is some evidence which you may regard in determining whether or not the defendant, the American Lithographic Company, did print, did etch, &c., and did expose or sell or expose for sale those copies of that painting. Would it have given such a guarantee unless it was engaged in printing it, copying it and selling it, or offering it for sale to the American Tobacco Company? That is a circumstance. That is evidence which it is your duty to consider and which you may consider. You
256 must use your common sense as intelligent men and on the evidence submitted to you decide.

Mr. JENNER: I except to your Honor's charge that there was evidence showing that there was — indemnity agreement.

The COURT: I say there is some evidence. You have heard the evidence on that subject. What those negotiations were it is for you to say, gentlemen.

Anything further?

Mr. JENNER: Nothing further.

The COURT: There is one thing I will say to you here. There has been a great deal of discussion about the admissibility of evidence and the legality of papers. Do not let all that talk that has passed between the Court and counsel on the argument of legal questions, do not let that influence you in the slightest degree. Take this case on the evidence as to who printed these copies, who offered them for sale, are they copies, &c.: take the evidence on those questions and decide, and those are the questions for you.

The jury then retired.

Verdict for the plaintiff in the sum of $10,000.

Defendant's counsel asks that the jury be polled.

The jury is polled and find as above.

Defendant's counsel moves to set aside the verdict on the ground that it is excessive, contrary to the evidence and contrary to law, and on all the grounds mentioned in Section 999 of the Code of Civil Procedure, and for a new trial.

The Court entertains the motion on the Judge's minute- and on the stenographer's minutes, and denies the motion and gives a stay of sixty days in which to make a proposed case and exceptions, plaintiff to have a like time for amendment. Judgment may be entered, but an order staying further proceedings on the judgment until the de-

termination of the appeal, if one is taken and prosecuted
257 diligently, and with permission to the plaintiff at any time to apply to vacate the stay in case it is not promptly prosecuted.

This can be written out by the Clerk as part of the minutes.

The foregoing bill of exceptions contains all of the evidence and testimony in any way material to the exceptions sought to be reviewed.

And inasmuch as said matters produced and offered in evidence on the trial, and the said exceptions so made to the rulings and decisions of the said Judge do not appear upon the record of the said cause in the Circuit Court of the United States for the Southern District of New York, the defendant has prepared and caused to be settled this bill of exceptions as a record thereof in accordance with the statutes in such cases made and provided, and the Court hereby signs and orders this bill of exceptions to be filed this 29th day of August, in the year one thousand nine hundred and seven.

GEO. W. RAY,
U. S. Judge.

We hereby consent to the settlement and filing of the above bill of exceptions.

Dated August 23d, 1907.

BRIESEN & KNAUTH,
Attorneys for Plaintiff.
WETMORE & JENNER,
Attorneys for Defendant.

(Endorsed:) United States Circuit Court, Southern District of New York.—Emil Werckmeister, Plaintiff, vs. American Lithographic Company, Defendant.—Bill of Exceptions.—Wetmore & Jenner, Attorneys for Defendant, 34 Pine Street, New York City.—Service of a copy of the within Bill of Exceptions this 8th day of January, 1907, is hereby admitted. Briesen & Knauth, Att'ys for Pl'ff.—U. S. Circuit Court, Southern District of N. Y.—Filed Sep. 4, 1907.—John A. Shields, Clerk.

258 United States Circuit Court, Southern District of New York.

EMIL WERCKMEISTER, Plaintiff,
vs.
AMERICAN LITHOGRAPHIC COMPANY, Defendant.

Assignment of Error.

The defendant makes the following assignments of error upon which it will rely in its prosecution of the writ of error in the above entitled cause.

1st. That by the record aforesaid and the bill of exceptions it appears that the Court erred in permitting the following question propounded by the plaintiff to Charles Eddy:

"Q. What are your functions as secretary of the American Lithographic Company?"

The defendant had objected to a prior question to the same witness on the ground that the action was brought under Section 4965 of the Revised Statutes and was a penal action, and on the ground of Sections 724 and 860 of the Revised Statutes, and that the witness being a stockholder was privileged from answering and the defendant was privileged from giving testimony either by books or by officers under said Sections 724 and 860 and the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States,

259 which objections the Court overruled, and the defendant excepted to each of the rulings and the plaintiff agreed and the Court permitted that every question put to the witness should be understood to be under the same objection, ruling and exception.

The witness answered as follow-:

"A. As secretary I keep the minutes of the meetings of the Board of Directors; I attest the seal of the company when necessary, and attend to some little correspondence. I have general supervision over the manufacturing departments at Nineteenth street and Fourth avenue, since February last, I think it was. Before February last I was the purchasing agent for several years, my recollection is from June, 1901, up to this period when I took the other occupation, in February last. I did my business during that period at the company's office, Nineteenth street and Fourth avenue. During those years I was only purchasing agent—I was secretary and purchasing agent. I have been secretary since February, 1901."

2d. That by the record aforesaid and the bill of exceptions, it appears that the Court erred in permitting the following question propounded by the plaintiff to Charles Eddy:

"Q. And deliver them yourselves?"

The question was objected to by counsel for defendant on the statutory grounds (Revised Statutes, Sections 724 and 860). The objection was overruled, to which ruling the defendant duly excepted.

The Witness answered:

"A. We make lithographs in colors. That has been the business of our company since its incorporation since before 1901."

3d. That by the record aforesaid and the bill of exceptions, it appears that the Court erred in permitting the following

260 question propounded by the plaintiff to Charles Eddy:

"Q. Now, how long have you been doing business with the American Tobacco Company?"

The question was objected to by counsel for the defendant on the ground that the defendant and the witness was protected under Sections 724 and 860 of the Revised Statutes and the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States. The objection was overruled and — thereupon duly excepted. The witness answered, among other things:

"A. Several years: I should say eight or ten years. I do not know of deliveries of lithographic matter to them."

4th. That by the record aforesaid and the bill of exceptions it

appears that the Court erred in permitting the following question propounded by the plaintiff to Charles Eddy:

"Q. What was his position with the company previous to that time?"

The witness declined to answer on the ground that it tended to inflict a penalty of forfeiture upon the American Lithographic Company, and thus upon him as a stockholder. Under the previous direction of the Court and the agreement of counsel the objection by the defendant to the question on the grounds of Sections 724 and 860 of the Revised Statutes and the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States also applied. The defendant's objections were overruled and the witness was directed to answer, and under the said general direction of the Court and agreement of counsel the defendant excepted to such ruling. The witness answered:

"A. He was a salesman. I do not know what he sold. We do printing."

261 5th. That by the record aforesaid and the bill of exceptions, it appears that the Court erred in requiring the witness Charles Eddy to produce, under a subpœna *duces tecum* the books, papers and accounts of the defendant, to which the defendant objected, on the ground that the service of the subpœna did not conform to the sections of the Code of Procedure of the State of New York in respect of the person served, in respect of the description of the books and papers, and in respect of the time elapsing between the service and the return day of the subpœna. The objections were overruled, to which ruling the defendant excepted.

6th. That by the record aforesaid and the bill of exceptions, it appears that the Court erred in adjudging the witness to be guilty of open contempt of court and in committing the witness to the custody of the Marshal and directing him to be imprisoned because the witness refused to hand over the minute book of the defendant to the Court. The defendant declined to produce books and papers on the ground that the Court was without authority to require the production; that the time allowed was insufficient; that the description of the books and papers were too comprehensive; that the order was improvident in that respect, and that the witness was privileged under Section 724. Subsequently, the witness did deliver to the Court, under the defendant's protest and objection, the minute book.

7th. That by the record aforesaid and the bill of exceptions, it appears that the Court erred in permitting the following question propounded by the plaintiff to Louis Ettlinger, the treasurer of the defendant:

"Q. What was the system of the American Lithographic Company during the years 1901 and 1902, with reference to keeping a record of the matters manufactured by it?"

262 The question was objected to by the defendant on the ground that the witness was privileged from answering in view of the nature of the action, and was protected by the Fourth and Fifth Amendments to the Constitution of the United States, and under the general rule that in actions of this nature the defend-

ant was protected from discovery by its officers, and that it might tend to subject the witness to a penalty, and it then appearing that the witness was a stockholder of defendant company, defendant objected on the further ground that an answer to the question would subject the witness to penalty as well as the company of which he was an officer. The objection was overruled, to which ruling the defendant excepted.

The witness answered:

"A. Well, the records are kept in the manufacturing department and in the auditing department."

8th. That by the record aforesaid and the bill of exceptions, it appears that the Court erred in permitting the following question propounded by the plaintiff to the witness Louis Ettlinger:

"Q. How long have you known him to be a salesman for your company, in what years?"

The question was objected to by counsel for the defendant on the same grounds as a prior question, viz., that the witness was privileged from answering in view of the nature of the action, and was protected by the Fourth and Fifth Amendments to the Constitution of the United States, and under the general rule that in actions of this nature the defendant was protected from discovery by its officers, and that it might tend to subject the witness to a penalty, which objection was overruled, and to which ruling the defendant excepted.

The witness answered:

"A. I suppose I have known him for about eight years past in the character of a salesman for my company. He is not now
263 in the employ of my company."

9th. That by the record aforesaid and the bill of exceptions, it appears that the Court erred in ordering, requiring and compelling the defendant, at the instance of the plaintiff, and also of its own motion for the benefit of plaintiff, to produce its books of account, and its secretary, Charles Eddy, to testify therefrom, and to give in evidence therefrom entries contained therein in aid of proving the plaintiff's complaint, all against the protest and objection of the defendant that such production was compulsory and violated the defendant's rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and under Section 724 of the Revised Statutes, and that the defendant was otherwise privileged, to which orders and requirements and evidence the defendant duly excepted. The defendant had also objected to the said witness answering any question which might tend to render the defendant liable to a penalty on the ground of Section 860 of the Revised Statutes, as well as Section 724, and the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, and it has been agreed to by the plaintiff and directed by the Court that the defendant might regard every question to be under the same objection, ruling and exception.

10th. That by the record aforesaid and the bill of exceptions it appears that the Court erred in permitting the following question propounded by the plaintiff to Charles Eddy:

"Q. Please let us know what is the next item that you find?"

The question was objected to by counsel for the defendant because it required the witness, who was the secretary of the defendant, to read in evidence entries from the books of the defendant, and
264 on the ground that giving such evidence violated the defendant's rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and under Section 724 of the Revised Stattues, and that the defendant was otherwise privileged. The defendant had also objected to the said witness answering any question which might tend to render the defendant liable to a penalty on the ground of Section 860 of the Revised Statutes, as well as Section 724, and the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, and it had been agreed to by the plaintiff and directed by the Court that the defendant might regard every question to be under the same objection, ruling and exception. The objection was overruled, and thereupon defendant duly excepted. The witness answered, among other matters:

"1,000 show cards Old English Curve cut $50. 1,000 show cards shipped to Deuther Manufacturing Company. Not paid. Buffalo, N. Y."

11th. That by the record aforesaid and the bill of exceptions it appeared that the Court erred in permitting the following question propounded by the plaintiff to Charles Eddy:

"Please let us know what is the next item that you find?"

The question was objected to by counsel for the defendant because it required the witness, who was the secretary of the defendant, to read in evidence to the jury entries from the books of the defendant, and on the ground that giving such evidence violated the defendan's rights under the Fourth, Fifth and Fourteenh Amendments to the Constitution of the United States and under Section 724 of the Revised Statutes, and that the defendant was otherwise privileged. The defendant had also objected to the said wit-
265 ness answering any question which might tend to render the defendant liable to a penalty on the ground of Section 860 of the Revised Statutes as well as Section 724, and the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, and it has been agreed to by the plaintiff and directed by the Court that the defendant might regard every question to be under the same objection, ruling and exception. The objection was overruled and thereupon the defendant duly excepted.

The witness answered, among other matters:

"A. Day book 5, page 589, May 10, 1902, American Tobacco Company. 25 Old English Curve Cut hangers at 5¢ each (without any tubes) $1.25. 25 tubes at 1½¢ .38 $163. Same book, page 614 May 17, 1902. American Tobacco Company. 1000 show cards Old English Curve Cut $50. American Tobacco Company 50 Old English Curve Cut show cards, 5¢ each (select and tinned) $2.50. To tinning at $13 a thousand .65 $3.15. American Tobacco Company. 750 Here's to Old English hangers, at 5¢ $37.50. Tinning at $13. a thousand 9.75 $47.25. American Tobacco Company.

1200 Here's to Old English hangers $60.00. To tinning at $13. a thousand, 15.*0 $75.60. Page 614 1000 show cards—that item there—shipped to Deuther Manufacturing Company. Not paid. J 9033, Buffalo, N. Y. Page 643 May 24, 1902. American Tobacco Company. 1500 Old English Curve Cut show cards at 5¢ each $75. Shipped to Deuther Manufacturing Company, Buffalo, N. Y. Not paid. 500 to D. H. Hall, St. Louis, Mo., $1.22. 200 to M. V. Shallcross, Louisville, Ky., .75. 500 to S. S. Goodloe, Pittsburgh, Pa., .63 J 9033. Page 652, same book. May 27, 1902, American Tobacco Company 1,300. Here's to Old English hangers at 5¢ each, $65. Tinning at $13 a thousand 16.90. Freight 1.45 $81.90. 500 to Ira Stover, Chicago, Ill., via S. U., .98. 500 to E. S. Dusel, Boston, Mass., via Met., .29. 300 to H. K.
266 Ramsey, Bound Brook, N. J., N. J. C., .18 $1.45. Page 661 May 29, 1902. American Tobacco Company. 1,000 Here's to Old English at 5¢ each 50.00. To tinning 13.00 $63.00. Shipped to A. J. Fitzsimmons. Frt. 1.46 J. 9033. Page 667 May 31, 1902, American Tobacco Company 3 show cards. Here's to Old English at 1.67 ea. 5.01 (Mounted on satin) deld. to City. Day Book No. 6, page 17, June 3, 1902, American Tobacco Company. 1,000 Here's to Old English hangers at 5¢ each 50.00. To tinning at $13 a thousand 13.00 to $63.00. Delivered to Charles Dushkind, City. Page 30 June 6, 1902, American Tobacco Company. 500 Here's to Old English hangers at 5¢ each 25.00. Tinned at $13 a thousand 6.50 $31.50 Shipped to C. C. Heldman, Detroit, Mich. Page 36 June 7, 1902, American Tobacco Company To freight charges on 500 Here's to Old English hangers shipped 52402 2.81. Page 78 June 19, 1902. 3 Bills American Tobacco Company 200 Old English Curve Cut hangers at 5¢ each $10.00. To tinning $13 a thousand 2.60 $12.60. Shipped to M. B. Shallcross 75¢ J 9033 Louisville, Ky. Page 83 June 20, 1902, 3 Bills American Tobacco Company. 100 Here's to Old English cards (No lettering and no tinning) at 5¢ each 5. Delivered to Mr. Wilson Order J 9033 111 Fifth Avenue Page 131 June 30, 1902. W A S 417¢ American Tobacco Company 10 Old English Curve Cut show cars Mounted on Satin at 1.67 each 16.70 10 tubes at 2 cents each, .20 $16.90 Delivered to Mr. Wilson J 9033.

12th. That by the record aforesaid and the bill of exceptions it appears that the Court erred in permitting the following question propounded by the plaintiff to Charles Eddy:

"Q. Can you produce the ledgers in which these entries were posted?"

The question was objected to by counsel for the defendant because it required the witness, who was the secretary of the defend-
267 ant, to read in evidence to the jury entries from the books of the defendant, and on the ground that giving such evidence violated the defendant's rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and under Section 724 of the Revised Statutes, and that the defendant was otherwise privileged. The defendant had also objected to the said witness answering any question which might tend to render

the defendant liable to a penalty on the ground of Section 860, of the Revised Statutes, as well as Section 724, and the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, and it had been agreed to by the plaintiff and directed by the Court that the defendant might regard every question to be under the same objection, ruling and exception. The objection was overruled and thereupon the defendant duly excepted.

The witness answered:

"A. I have the ledgers between the periods, sir."

13th. That by the record aforesaid and the bill of exceptions it appears that the Court erred in permitting the following question propounded by the plaintiff to Charles Eddy:

"Q. Will you look over the account and compare it with the list of items?"

The question was objected to by counsel for the defendant because it required the witness, who was the secretary of the defendant, to read in evidence to the jury entries from the books of the defendant and on the ground that giving such evidence violated the defendant's rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and under Section 724 of the Revised Statutes, and that the defendant was
268 otherwise privileged. The defendant had also objected to the said witness answering any question which might tend to render the defendant liable to a penalty on the ground of Section 860 of the Revised Statutes, as well as Section 724, and the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, and it had been agreed to by the plaintiff and directed by the Court that the defendant might regard every question to be under the same objection, ruling and exception. The objection was overruled and thereupon the defendant duly excepted.

The witness answered, among other matters:

"A. The item of May 10, 1902, on page 589, on day book No. 5, amount $1.63. There is an item posted in the le-ger under that date, page No. 25, ledger A to L, No. 2, for $1.63, under that date, May 10, 1902."

14. That by the record aforesaid and the bill of exceptions it appears that the Court erred in permitting the following question propounded by the plaintiff to Charles Eddy:

"Q. Now, will you please make the same comparison with reference to the subsequent entries, all of them?"

The question was objected to by counsel for the defendant because it required the witness, who was the secretary of the defendant, to read in evidence to the jury entries from the books of the defendant, and on the ground that giving such evidence violated the defendant's rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and under Section 724 of the Revised Statutes, and that the defendant was otherwise privileged. The defendant had also objected to the said witness answering any question which might tend to render the defendant liable to a penalty on the ground of Section 860 of the Revised Statutes as well as Section 724, and the Fourth, Fifth and Four-

teenth Amendments to the Constitution of the United States,
269 and it had been agreed to by the plaintiff and directed by the Court that the defendant might regard every question to be under the same objection, ruling and exception. The objection was overruled and thereupon the defendant duly excepted.

The witness answered, among other things:

"A. The next one is on page 614, under date of May 17, 1902, $50. Such an item is posted in the ledger on the same page. The next item is on page 638, under date of May 23, 1902, amounting to $3.15. Such an item is posted to page 26 of the ledger. The next item is on page 642 of the day book, which amounts to $47.25. Another item of $2.81, which I presume is freight. That item of $47.25 was correctly posted on that page. They seem to have omitted it at that time and to have inserted it later. An item of May 24, of $75., posted to page 26 of the ledger. Page 646, May 26, 1902, item of $75.60 and $2.60 for freight. That is posted as one item, $78.20, on page 26. Page 652, May 27, 1902, $81.90, and $1.45, which is freight, that is posted as one item of $83.35 on page 26. Page 661, May 29, 1902, an item of $63, and $1.46 for freight. That is posted on page 26. Page 667, May 31, 1902, item of $5.01. That is posted on page 26. Day Book No. 6, page 717, June 3, 1902, item of $63. It is posted at page 215 of the same ledger. Page 30, June 6, an item of $31.50, and 83 cents for freight. That is posted as one item at page 215. Page 36, June 7, 1902, an item of $2.81 for freight. I find that item on page 26. Page 78, June 19, 1902, an item of $12.60 and another item of 75 cents. That is posted as one item at page 215. Page 83, June 20, 1902, there is an item of 85. That is posted on page 216. Page 131, June 30, 1902, an item of $16.90. That is posted on page 216. That is all, sir."

15th. That by the record aforesaid and the bill of excep-
270 tions it appears that the Court erred in permitting the following question propounded by the plaintiff to Charles Eddy:

"Q. You find they were all carried in the ledger?"

The question was objected to by counsel for the defendant because it required the witness, who was the secretary of the defendant, to read in evidence to the jury entries from the books of the defendant, and on the ground that giving such evidence violated the defendant's rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and under Section 724 of the Revised Statutes, and that the defendant was otherwise privileged. The defendant had also objected to the said witness answering any question which might tend to render the defendant liable to a penalty on the ground of Section 860 of the Revised Statutes as well as Section 724, and the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States, and it has been agreed to by the plaintiff and directed by the Court that the defendant might regard every question to be under the same objection, ruling and exception. The objection was overruled, and thereupon the defendant duly excepted.

The witness answered among other matters:

"A. All carried on the ledger, sir."

16th. That by the record aforesaid and the bill of exceptions it appears that the Court erred in permitting the following questions propounded by the plaintiff to Charles Eddy:

"By Mr. KNAUTH:

Q. Will you please look on the other side of the ledger account and tell us whether these several items which you have read therefrom are marked as paid for by the American Tobacco Company?"

271 Which question the Court supplemented by the following direction:

"The COURT: Whether the American Tobacco Company is credited with having paid for them on the books of this defendant?"

And also by the following direction:

"By the COURT:

"Q. Well, you may give the credits that do appear, credits given by the American Lithographic Company to the American Tobacco Company? Read the dates and the credits."

After which the question was amended by plaintiff's counsel as follows:

"Mr. KNAUTH: After the date of July 17, 1901, yes; after the first charge; commence with the date of the first charge and give the credit."

And the Court further supplemented the question by the following directions:

"Q. Yes. Read them all off—that is, what is competent, anyway; those credits that appear on those books. That is evidence—some evidence at least—that the American Tobacco Company paid those amounts to the American Lithographic Company; that is the evidence."

The question was objected to by counsel for the defendant because it required the witness, who was the secretary of the defendant, to read in evidence to the jury entries from the books of the defendant, and on the ground that giving such evidence violated the defendant's rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and under Section 724 of the Revised Statutes, and that the defendant was otherwise privileged. The defendant had also objected to the said witness answering any question which might tend to render the

272 defendant liable to a penalty on the ground of Section 860 of the Revised Statutes as well as Section 724, and the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, and it had been agreed to by the plaintiff and directed by the Court that the defendant might regard every question to be under the same objection, ruling and exception. The objection was overruled, and thereupon the defendant duly excepted.

The witness answered among other things:

"A. May 10, 1902, 129.12; May 13, 416.11; May 15, 2,101.58; May 20, 3,668.97; May 22, 393.92; May 27, 152.49; May 21, 78.34; May 22, 38.05; May 29, 79.64; June 3, 41.98; June 5, 235; June

7, 346.71; June 12, 813.54; June 14, 353.16.; June 7, 45.96; June 9, 693.; June 18, 34.87; June 18, 307.19; June 19, 3,848.92; June 19, 720.36; June 20, 105.52; June 24, 513.29; June 27, 1,127.11; June 30, 318.06; July 3, 889.66; July 3, 904.30; July 7, 17.09; July 9, 182.53; July 10, 655.06; July 11, 182.68; July 14, 50.50; July 15, 81.40; July 16, 219.41; July 16, 3,335.34; July 18, 1,012.12; July 23, 207.70; July 25, 721.41; July 29, 1,122.47; August 2, 20.54; August 6, 3,420.88; August 8, 5,098.47; August 9, 2,821.38; August 13, 1,042.55; August 15, 2,191.11; August 15, 649.02; August 19, 51.48; August 20, 1,099.93; August 22, 826.59; August 22, 10.; August 26, 657.76; August 26, .06; August 23, 40.; August 28, 320.50; August 29, 791.53; September 1, 338.98; September 5, 1,099.27; September 9, 539.65; September 10, 3,506.54; September 11, 1,295.75; September 15, 790.42; September 19, 654.35; September 20, 50.06; September 20, 5.00; September 20, 16.90; September 26, 840.83; October 1, 1.07; October 2, 2,150.09, October 8, 10.08; October 9, 652.66; October 14, 64.86; October 17, 1,351.16; October 18, 2,633.16; October 24, 1,096.66; October 24, 2,276.49; October 24, .10; October 30, 14.70; October 31, 2,010.23; October 31, 11.78; November 6, 68.63; November 7, 38.75; November 7, .20; November 7, 1,218.55; November 11, 997.37; November 13, 270.76; November 13, 918.76; November 14, 470.50; November 19, 35.; November 21, 300.87; November 28, 339.30; December 5, 856.06; December 9, 234.74; December 11, 590; December 12, 24.60; December 19, 619.08; December 23, 855.20; December 24, 1,253.86; December 30, 402.19; December 31, 10/75; December 31, 1,493.38; December 31, 30."

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17th. That by the record aforesaid and the bill of exceptions it appears that the Court erred in permitting the following question propounded by the plaintiff to Charles Eddy:

"Q. When was the account balanced after May 10, 1902?"

The question was objected to by counsel for the defendant because it required the witness, who was the secretary of the defendant, to read in evidence to the jury entries from the books of the defendant, and on the ground that giving such evidence violated the defendant's rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and under Section 724 of the Revised Statutes, and that the defendant was otherwise privileged. The defendant had also objected to the said witness answering any question which might tend to render the defendant liable to a penalty on the ground of Section 860 of the Revised Statutes as well as Section 724, and the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, and it had been agreed to by the plaintiff and directed by the Court that the defendant might regard every question to be under the same objection, ruling and exception. The objection was overruled and thereupon defendant duly excepted.

The witness answered among other matters:

"A. A balance was struck June 30, 1902. The balance was then carried forward."

274 18th. That by the record aforesaid and the bill of exceptions it appears that the Court erred in permitting the following question propounded by the plaintiff to Charles Eddy:

"Q. How much was it then; what balance was carried forward?"

The question was objected to by counsel for the defendant because it required the witness, who was the secretary of the defendant, to read in evidence to the jury entries from the books of the defendant, and on the ground that giving such evidence violated the defendant's rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and under Section 724 of the Revised Statutes, and that the defendant was otherwise privileged. The defendant had also objected to the said witness answering any question which might tend to render the defendant liable to a penalty on the ground of Section 860 of the Revised Statutes as well as Section 724 and the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, and it had been agreed to by the plaintiff and directed by the Court that the defendant might regard every question to be under the same objection, ruling and exception. The objection was overruled, and thereupon the defendant duly excepted.

The witness answered, among other things:

"A. $9,123.64. That amount was still owing by the American Tobacco Company to our company. The next balance was December 31, 1902. The balance then was $1,260.05. It says by balance to some other ledger. The balance brought forward was $1,260.05. The next balance seems to be on June 30, 1903, $13,362.31."

19th. That by the record aforesaid and the bill of exceptions it appears that the Court erred in propounding the following question to Charles Eddy:

275 "By the COURT:

"Q. Give the next one. I do not see that that is helping it out, except inferentially. They do not seem to have paid up in full."

The question was objected to by counsel for the defendant because it required the witness, who was the secretary of the defendant, to read in evidence to the jury entries from the books of the defendant and on the ground that giving such evidence violated the defendant's rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and under Section 724 of the Revised Statutes, and that the defendant was otherwise privileged. The defendant had also objected to the said witness answering any question which might tend to render the defendant liable to a penalty on the ground of Section 860 of the Revised Statutes, as well as Section 724, and the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, and it had been agreed to by the plaintiff and directed by the Court that the defendant might regard every question to be under the same objection, ruling and exception. The objection was overruled, and thereupon the defendant duly excepted.

The witness answered, among other things:

"A. Balance December 31, 1903, $16,947.45. Balance on June 30, 1904, $872.27."

20th. That, by the record aforesaid and the bill of exceptions, it appears that the Court erred in propounding the following question to Charles Eddy:

"Q. What is your next balance. See if you can find one?"

The question was objected to by counsel for the defendant because it required the witness, who was the secretary of the defendant, to read in evidence to the jury entries from the books of the
276 defendant, and on the ground that giving such evidence violated the defendant's rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and under Section 724 of the Revised Statutes, and that the defendant was otherwise privileged. The defendant had also objected to the said witness answering any question which might tend to render the defendant liable to a penalty on the ground of Section 860 of the Revised Statutes as well as Section 724, and the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, and it had been agreed to by the plaintiff and directed by the Court that the defendant might regard every question to be under the same objection, ruling and exception. The objection was overruled, and thereupon the defendant duly excepted.

The witness answered, among other things:

"A. We are up to December 31st—No, that was June 30, 1904. Yes, there is one more balance after that. On December 31, 1904, balance $71.57."

21st. That by the record aforesaid and the bill of exceptions it appears that the Court erred in permitting the following question propounded by the plaintiff to Charles Eddy:

"Q. I suppose the books you have produced, the ledgers and the day books, are the ordinary books kept of accounts of the defendant company."

The question was objected to by counsel for the defendant because it required the witness, who was the secretary of the defendant, to read in evidence to the jury entries from the books of the defendant, and on the ground that giving such evidence violated the defendant's rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and under Section 724 of the Revised Statutes, and that the defendant was otherwise privi-
277 leged. The defendant had also objected to the said witness answering any question which might tend to render the defendant liable to a penalty on the ground of Section 860 of the Revised Statutes, as well as Section 724, and the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, and it had been agreed to by the plaintiff and directed by the Court that the defendant might regard every question to be under the same objection, ruling and exception; The objection was overruled, and thereupon the defendant duly excepted.

The witness answered, among other things:

"A. Yes, sir."

22d. That by the record aforesaid and the bill of exceptions it ap-

peared that the Court erred in permitting the following question propounded by the plaintiff to Charles Eddy:

"Q. And so far as you know they were correct?"

The question was objected to by counsel for the defendant, because it required the witness, who was the secretary of the defendant, to read in evidence to the jury entries from the books of the defendant, and on the ground that giving such evidence violated the defendant's rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and under Section 724 of the Revised Statutes, and that the defendant was otherwise privileged. The defendant had also objected to the said witness answering any question which might tend to render the defendant liable to a penalty, on the ground of Section 860 of the Revised Statutes, as well as Section 724, and the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, and it has been agreed to by the plaintiff and directed by the Court that the defendant might regard every question to be under the same ob-
278 jection, ruling and exception. The objection was overruled and thereupon the defendant duly excepted.

The witness answered, among other matters:

"A. Yes, sir."

23d. That by the record aforesaid and the bill of exceptions it appears that the Court erred in receiving in evidence the summons, amended complaint, answer, reply, minutes of trial and judgment, constituting the judgment roll in an action brought in the United States Circuit Court for the Southern District of New York by Emil Wreckmeister against the American Tobacco Company (Plaintiff's Exhibit P).

The papers were objected to by counsel for the defendant, on the ground that the same was incompetent against the defendant, irrelevant to any issue in the case and immaterial. The objection was overruled and the defendant excepted.

24th. That by the record aforesaid and the bill of exceptions it appears that the Court erred in receiving in evidence the bill of complaint in a suit brought in the Circuit Court for the Southern District of New York by Emil Wreckmeister against the American Tobacco Company and the American Lithographic Company, and the answer of the American Tobacco Company in said suit.

To which papers the defendant objected on the ground that they were incompetent and irrelevant as against the defendant. The objection was overruled and thereupon defendant duly excepted.

25th. That by the record aforesaid and the bill of exceptions it appears that the Court erred in permitting the following question propounded by the plaintiff to Percival S. Hill:

"Q. You know that you are indemnified by some agreement on the part of the American Lithographic Company, too, to keep you indemnified?"

279 The question was objected to by counsel for the defendant as incompetent, immaterial and irrelevant, assuming matters

not true and also stating conclusions. The objection was overruled and thereupon defendant duly excepted.

The witness answered:

"A. I know from statements made. I have seen no papers. Nothing has come under my personal observation in regard to it."

26th. That by the record aforesaid and the bill of exceptions it appears that the Court erred in permitting the following question propounded by the plaintiff to Percival S. Hill:

"Q. Were the facts to which you swore on July 22, 1903, true to the best of your knowledge?"

The answer being the answer of the American Tobacco Company to the bill of complaint of Emil Werckmeister in a suit brought by said Emil Werckmeister against the American Tobacco Company and the American Lithographic Company.

The question was objected to on the ground that the matter was immaterial and incompetent as against the defendant and irrelevant to any issue on the case and an improper way of eliciting testimony. The objection was overruled. The defendant excepted.

The witness answered:

"They were."

28th. That by the record aforesaid and the bill of exceptions, it appears that the Court erred in permitting the following question propounded by the plaintiff to said Percival S. Hill:

"Q. Now, please state whether the facts stated in the answer of your company, the American Tobacco Company (Plaintiff's
280 Exhibit Q), and which answer was signed by you were true, according to the best of your knowledge at the time?"

The question was objected to by counsel for the defendant, on the ground that the matter inquired for its matter that is incompetent and irrelevant against the defendant and improper way of eliciting testimony. The statement therein made was made upon information, rendering the matter incompetent against the defendant. The objection was overruled and the defendant duly excepted.

The witness answered:

"They were."

29th. That by the record aforesaid and the bill of exceptions, it appears that the Court erred in refusing to grant the defendant's motion, upon the conclusion of the plaintiff's evidence, that the complaint be dismissed or that a verdict for the defendant be directed, on the ground that the plaintiff had no statutory right to take the copyright alleged in the complaint, he not being authorized under Section 4962 of the Revised Statutes to take the copyright, not being the author, inventor, designer or proprietor of the painting, nor the *assigns* of such person, to which refusal of the Court to grant said motion the defendant duly excepted.

30. That by the record aforesaid and the bill of exceptions it appears that the Court erred in refusing to grant the defendant's motion, upon the conclusion of the plaintiff's evidence, that the complaint be dismissed, or that a verdict for the defendant be directed, on the ground that the plaintiff had no right to maintain the action on the copyright mentioned in the complaint, because neither the

painting nor the substance on which the same was mounted was inscribed with the notice required by Section 4962, to which refusal of the Court to grant said motion the defendant duly excepted.

281 31st. That by the record aforesaid and the bill of exceptions it appears that the Court erred in refusing to grant the defendant's motion, upon the conclusion of the plaintiff's evidence, that the complaint be dismissed, or that a verdict for the defendant be directed, on the ground that the plaintiff had no right to maintain the action on the copyright, because the painting was published both by public exhibition of the painting itself and by the publication of photogravures of it, and neither the painting nor the substance on which the same was mounted was inscribed with the notice required by Section 4962, to which refusal of the Court to grant said motion the defendant duly excepted.

32d. That by the record aforesaid and the bill of exceptions it appears that the Court erred in refusing to grant the defendant's motion, upon the conclusion of the plaintiff's evidence, that the complaint be dismissed, or that a verdict for the defendant be directed, on the ground that there was no evidence in the case of any copies of the painting which were in the possession of the defendant or by it sold or exposed for sale within the meaning of Section 4965, to which refusal of the Court to grant said motion the defendant duly excepted.

33d. That by the record aforesaid and the bill of exceptions it appears that the Court erred in refusing to grant the defendant's motion, upon the conclusion of the plaintiff's evidence, that the complaint be dismissed or that a verdict for the defendant be directed, on the ground that there was no evidence of any copy of the painting as distinguished from photographs or photogravures having been in the possession of the defendant or by it made, sold or exposed for sale, to which refusal of the Court to grant said motion the defendant duly excepted.

34th. That by the record aforesaid and the bill of exceptions it appears that the Court erred in refusing to grant the defendant's motion, upon the conclusion of the plaintiff's evidence, that the complaint be dismissed or that a verdict for the defendant be directed on the ground that the allegations of the complaint were not proved and that defendant was not shown guilty and liable to penalties or forfeitures, to which refusal of the Court to grant said motion the defendant duly excepted.

35th. That by the record aforesaid and the bill of exceptions it appears that the Court erred in refusing to grant the defendant's motion, upon the conclusion of the plaintiff's evidence, that the complaint be dismissed, or that a verdict for the defendant be directed, on the ground that there was no evidence that any of the alleged infringing sheets were made, worked, printed or copied by the defendant since July 17, 1901, and that the cause of action, if any, accrued by reason of the copying, printing or working, and there was no evidence that that was done within two years from July 17, 1901.

Wherefore the said American Lithographic Company, defendant, plaintiff in error, prays that the judgment of the Circuit Court of

the United States for the Southern District of New York be reversed and that said Circuit Court be directed to grant a new trial of said cause.

WETMORE & JENNER,
Attorneys for Plaintiff in Error,
Defendant in the Circuit Court.

(Endorsed:) United States Circuit Court, Southern District of New York.—Emil Werckmeister, Plaintiff, vs. American Lithographic Company, Defendant.—Assignments of error.—Wetmore & Jenner, Attorneys for Defendant, 34 Pine Street, New York.—U. S. Circuit Court, Southern District N. Y.—Filed May 17, 1907.—John A. Shields, Clerk.

283 *Federal Union Surety Company.*

Circuit Court of the United States of America for the Southern District of New York in the Second Circuit.

EMIL WERCKMEISTER, Suing for Himself, and the UNITED STATES, Complainant,
vs.
AMERICAN LITHOGRAPHIC COMPANY, Defendant.

Bond for Damages and Costs.

Know all Men by these Presents, that the Federal Union Surety Company, a corporation organized under the laws of the State of Indiana, and having its principal office in the City of Indianapolis, Indiana, and lawfully transacting business in the State of New York, and having its principal office in said State at No. 1 Madison avenue, in the Borough of Manhattan, in the City of New York, is held and firmly bound unto the above named in the sum of twelve thousand ($12,000.00) dollars, to be paid to the said Emil Werckmeister, for the payment of which, well and truly to be made, it binds itself, its successors and assigns, jointly and severally, firmly by these presents. Sealed with its seal, and dated the 22d day of January, in the year of our Lord one thousand nine hundred and seven.

Whereas, the above named American Lithographic Company has prosecuted an appeal to the United States Circuit Court of Appeals for the Second Circuit, to reverse the judgment rendered in the
284 above entitled suit, by the Judge of the Circuit Court of the United States for the Southern District of New York.

Now, therefore, the condition of this obligation is such, that if the above named American Lithographic Company shall prosecute its appeal to effect, and answer all damages and costs, if it fail to make its plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

FEDERAL UNION SURETY COMPANY.
By ROBERT M. NUGENT,
[L. S.] *Resident Vice-President.*

Attest:

F. STEARNS EDICK,
Resident Assistant Secretary.

Sealed and delivered and taken and acknowledged this 22d day of January, 1900, before me.

CATHRYN F. ASPELL,
Notary Public, New York County.

Cert. filed in Kings, Queens, Suffolk, Richmond and Westchester Counties.

STATE OF NEW YORK,
County of New York, ss:

On this 22d day of January, 1907, before me personally appeared Robert M. Nugent, resident vice-president of the Federal Union Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said: That he resides in the County of New York; that he is the resident vice-president of the Federal Union Surety Company, the corporation described in and which executed the foregoing bond; that he knows the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed by order of the Board of Directors of the said company, and that he signed said instrument as resident vice-
285 president of said company by like authority, and that the liabilities of said company do not exceed its assets, as ascertained in the manner provided by law and confirmed by an order of the Supreme Court of New York made and entered in New York County on March 30, 1904, and the said Robert M. Nugent further said that he is acquainted with F. Stearns Edick, and knows him to be the resident assistant secretary of said company; that the signature of said F. Stearns Edick, subscribed to the said instrument, is in the genuine handwriting of the said F. Stearns Edick, and was thereto subscribed by the like order of the said Board of Directors, and in the presence of him, the said Robert M. Nugent, resident vice-president.

CATHRYN F. ASPELL,
Notary Public, New York County.

Cert. filed in Kings, Queens, Suffolk, Richmond and Westchester Counties.

Copy of By-Law.

Be it Remembered, That at a meeting of the Board of Directors of the Federal Union Surety Company, duly called and held on the tenth day of July, 1901, a quorum being present, the following By-Law was adopted:

"Article VIII., Sec. 1. The President, Vice-President or "Second Vice-President may, from time to time, appoint Resident "Vice-Presidents, Resident Assistant Secretaries and Attorneys in "fact, to represent and act for and on behalf of the Company; and "either the President, Vice-President, Second Vice-President, the "Board of Directors or the Executive Committee may, at any time, "remove any such Resident Vice-President, Resident Assistant Sec-

"retary, or Attorney in Fact, and revoke the power and authority
"given him.

286 "SEC. 3. *Resident Vice-Presidents.* Resident Vice-Presi-
"dents shall have power and authority to sign and execute
"on behalf of the Company, any and all bonds, recognization, con-
"tracts of indemnity, and other writings obligatory in the nature
"thereof, and to bind the Company thereby as fully and to the same
"extent as the President could bind it.

"SEC. 4. Resident Assistant Secretaries shall have power and au-
"thority to affix the seal of the Company to, and attest on behalf of
"the Company, any and all bonds, recognizances, contracts of in-
"demnity and other writings obligatory in the nature thereof as
"fully and to the same extent as the Secretary could bind it."

STATE OF NEW YORK,
County of New York, ss:

I, F. Stearns Edick, resident assistant secretary of the Federal Union Surety Company, have compared the foregoing by-law with the original thereof as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original by-law.

Given under my hand and seal of the company, this 22d day of January, 1907.

[L. S.] F. STEARNS EDICK,
Resident Assistant Secretary.

(Endorsed:)—United States Circuit Court, Southern District of New York.—Emil Werckmeister, suing for himself and the United States, Complainant, against American Lithographic Company, Defendant.—Bond for Damages and Costs.—Surety: Federal Union Surety Company.—Approved as to form and also as to sufficiency of sureties, with reservation, however, to the Def't. in Error of the right at any time to examine the proper officers of the Surety Company, under oath, touching its assets, liabilities and financial condition generally. E. H. Lacombe, U. S. Circuit Judge.—U. S. Circuit Court, Southern District of New York.—Filed Jan. 23, 1907.—John A. Shields, Clerk.

287 By the Honorable E. Henry Lacombe, one of the Judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit, to Emil Werckmeister, Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, on the 15th day of June, 1907, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States for the Southern District of New York, wherein American Lithographic Company is plaintiff in error, and you are defendant in error, to show cause, if any there

be, why the judgment in said writ mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand, at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 17th day of May, in the year of our Lord one thousand nine hundred and seven, and of the Independence of these United States the one hundred and thirty-first.

E. H. LACOMBE,
Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

(Endorsed:)—United States Circuit Court of Appeals for the Second Circuit.—American Lithographic Company, Plaintiff in Error, vs. Emil Werckmeister, Defendant in Error.—Original Citation.—Service of a copy of the within citation this 20th day of May, 1907, is hereby admitted.—Breisen & Knauth, Att'ys for Def't in Error.—U. S. Circuit Court, Southern District, N. Y.—Filed May 22, 1907.—John A. Shields, Clerk.

288 United States Circuit Court of Appeals, Second Circuit.

Before Lacombe, Coxe, and Noyes, Circuit Judges.

THE AMERICAN LITHOGRAPHIC COMPANY, Plaintiff in Error,
vs.
EMIL WERCKMEISTER, Defendant in Error.

This cause comes here upon writ of error to review a judgment in favor of the defendant in error, who was plaintiff below, entered on the verdict of a jury for $10,000 in a *qui tam* action, brought to recover the money penalties for violation of Sec. 4965 U. S. Rev. Stat. relating to copyrights.

Per Curiam:

This cause was here before on a writ of error to review, a judgment in favor of plaintiff. After overruling the other exceptions then presented we reversed and remanded the cause for a new trial on the ground that there was not in the record competent legal evidence to support the verdict, much of the testimony offered by plaintiff having been excluded by the trial court on the mistaken theory that it was privileged. 146 F. R. 377. Upon the second trial the excluded testimony was admitted.

Upon the present appeal we see no reason to modify in any way our former ruling that the various books and papers of the defendant corporation are not privileged, following the decision of the Supreme Court in Hale v. Henkel 201 U. S. 43. The books and
289 papers were produced in court by officers or employees of defendant who had them in custody, after the trial judge had notified them that unless they obeyed the process of the court, which called for such production, he would commit them for contempt: a perusal of the record satisfies us that nothing short of a threat

of immediate commitment would have secured obedience to the process of the court. Defendant contends that such compulsory production was error, and his principal argument is directed to the construction of Sec. 724 U. S. Rev. Stat. But it is not at all necessary to refer to that section, the plaintiff had duly served a subpœna duces tecum for their production. Defendant is wholly in error in assuming that Sec. 724 is the only means provided for bringing a party's books and papers into court on the trial of an action at law. The inferior federal courts are expressly given power to issue all writs not specifically provided by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law. Sec. 716. Indeed, it would be immaterial if there were no such express provision; the power to issue a writ of subpœna to compel the production of written, as well as oral, testimony is essential to the very existence and constitution of a court of common law, which receives and acts upon both descriptions of evidence, and could not possibly proceed with due effect without them. Amey v. Long 9 East 473 per Ellenborough L. C. J. The power of courts to issue subpœnas duces tecum is so elementary that it will be sufficient to refer to an admirable discussion of the history and development of that power in Wigmore on Evidence Vol. III. Secs. 2190 to 2194. The Code of Civil Procedure has restricted the powers of the state courts by requiring that subpœna duces tecum must be served at least five days before the day when the witness is required to attend but no such
290 restriction has been imposed on the federal courts, although the trial judge would of course secure to the witness a reasonable time to comply with the requirements of the subpœna. Inasmuch as the witnesses in this case actually brought the documents into court before the taking of testimony was closed, there is no force in the suggestion that they did not have a reasonable time to comply.

Defendant argues again the various propositions presented by him on his former appeal viz: that the action is penal, that defendant was privileged and that no offending sheets were "found in defendant's possession." These have already been decided adversely to his contention and his re-argument has not induced a reconsideration of our former opinion.

Exceptions were reserved to the admission of certain items of evidence, including the judgment roll and minutes of testimony in a replevin action against The American Tobacco Company. While these were not competent, being *res inter alios acta*, we are satisfied that the error was not harmful, since abundant proof of the "sale" of the necessary number of copies was made by the entries in defendants' own books. Finally it is suggested that there was no evidence that any of the alleged infringing sheets were made within two years of the date of the action (Sec. 4968). We do not think it necessary to discuss the evidence at length, but are convinced that there was quite sufficient to warrant the jury in concluding that defendant had offended against the terms of Sec. 4965 within two years before the beginning of the action.

The judgment is affirmed.

291 (Endorsed:) United States Circuit Court of Appeals, Second Circuit. The American Lithographic Company, Pl'ff in Error, vs. Emil Werckmeister, Def't in Error. Opinion. Per Curiam. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 16, 1908. William Parkin, Clerk.

292 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, Held at the Court Rooms in the Post Office Building in the City of New York, on the 27th Day of November, One Thousand Nine Hundred and Eight.

Present: Hon. E. Henry Lacombe, Hon. Alfred C. Coxe, Hon. Walter C. Noyes, Circuit Judges.

AMERICAN LITHOGRAPHIC COMPANY, Plaintiff in Error,
vs.
EMIL WERCKMEISTER, Defendant in Error.

Error to the Circuit Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said Circuit Court be and it hereby is affirmed with costs.

E. H. L.

It is further ordered that a Mandate issue to the said Circuit Court in accordance with this decree.

293 Endorsed: United States Circuit Court of Appeals, Second Circuit. Am. Litho. Co. vs. E. Werckmeister. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 27, 1908. William Parkin, Clerk.

294 United States Circuit Court of Appeals for the Second Circuit.

AMERICAN LITHOGRAPHIC COMPANY, Plaintiff in Error,
vs.
EMIL WERCKMEISTER, Defendant in Error.

Petition for Writ of Error and Supersedeas.

American Lithographic Company, plaintiff-in-error in the above-entitled cause, feeling itself aggrieved by the order of this Court entered on the 27th day of November, 1908, comes now, by Wetmore & Jenner, its solicitors, and petitions said Court for an order allow-

ing said plaintiff-in-error to prosecute a writ of error to the Honorable Supreme Court of the United States under and according to the laws of the United States in that behalf made and provided; and, also, that an order be made fixing the amount of security which the plaintiff-in-error shall give and furnish upon said writ of error, and that upon the giving of such security, all further proceedings in this Court be suspended and stayed until the determination of said writ of error by the United States Supreme Court.

And your petitioner will ever pray.

AMERICAN LITHOGRAPHIC COMPANY,
By WM. A. JENNER, *Counsel.*

295 (Endorsed:) U. S. Cir. Ct. of Appeals, Second Circuit American Lithographic Co. vs. Emil Werckmeister. Petition for writ of error. Wetmore & Jenner, Solicitors for Pl'ff in Error, 34 Pine St., New York. Copy Received Dec. 4, 1908. Briesen & Knauth. United States Circuit Court of Appeals, Second Circuit. Filed Dec. 5, 1908. William Parkin, clerk. Service of copy of within petition for writ of error this 4th day of December, 1908, is hereby admitted.

296 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, Held at the Court Rooms Thereof, in the Post Office Building, in the Borough of Manhattan, City of New York, on the 4th Day of December, 1908.

Present: Hon. E. Henry Lacombe, Judge.

AMERICAN LITHOGRAPHIC COMPANY, Plaintiff in Error,
vs.
EMIL WERCKMEISTER, Defendant in Error.

Upon motion of Wetmore & Jenner, solicitors for the plaintiff-in-error, and upon filing a petition for writ of error and an assignment of errors, it is

Ordered that a writ of error be, and hereby is, allowed, to have reviewed in the United States Supreme Court the judgment heretofore entered herein on the 27th day of November, 1908, and that the amount of the bond on said writ of error be, and hereby is, fixed at thirteen thousand dollars and that upon filing said bond, all proceedings in this Court be suspended and stayed until the determination of said writ by the United States Supreme Court and the entry and service of an order thereon.

E. HENRY LACOMBE,
U. S. C. J.

297 (Endorsed:) U. S. Circuit Court of Appeals, Second Circuit. American Lithographic Company, Plaintiff in error, vs. Emil Werckmeister, Defendant-in-error. Order allowing writ of error. Wetmore & Jenner, Solicitors for Plaintiff in error, 34 Pine

St., New York. Copy received Dec. 4, 1908. Briesen & Knauth United States Circuit Court of Appeals, Second Circuit. Filed Dec. 5, 1908. William Parkin, clerk. Service of copy of within order allowing writ this 4th day of Dec., 1908, is hereby admitted.

298 Supreme Court of the United States.

AMERICAN LITHOGRAPHIC COMPANY, Plaintiff in Error,
vs.
EMIL WERCKMEISTER, Defendant in Error.

Afterwards, to wit, on the 2d day of December, 1908, before the Justices of the Supreme Court of the United States, at the Capitol in the City of Washington, comes the said American Lithographic Company by Wetmore & Jenner, its attorneys, and says that by the record proceedings aforesaid there is manifest error in the conclusion, determination and judgment of the Honorable Circuit Court of Appeals for the Second Circuit, made and entered herein on November 27th, 1908, in the following respects, to wit:

I. Error in not determining that the Circuit Court erred in permitting the following question propounded by the plaintiff to Charles Eddy:

"Q. What are your functions as secretary of the American Lithographic Company?"

The defendant had objected to a prior question to the same witness on the ground that the action was brought under Section 4965 of the Revised Statutes and was a penal action, and on the ground of Sections 724 and 860 of the Revised Statutes, and that the witness being a stockholder was privileged from answering and the defendant was privileged from giving testimony either by books or by officers under said Sections 724 and 860 and the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United

299 States, which objections the Court overruled, and the defendant excepted to each of the rulings, and the plaintiff agreed and the Court permitted that every question put to the witness should be understood to be under the same objection, ruling and exception.

The witness answered as follows:

"A. As secretary I keep the minutes of the meetings of the Board of Directors; I attest the seal of the company when necessary, and attend to some little correspondence. I have general supervision over the manufacturing departments at Nineteenth street and Fourth avenue, since February last, I think it was. Before February last I was the purchasing agent for several years, my recollection is from June, 1901, up to this period when I took the other occupation, in February last. I did my business during that period at the company's office, Nineteenth street and Fourth avenue. During those years I was only purchasing agent—I was secretary and purchasing agent. I have been secretary since February, 1901."

II. Error in not determining that the Circuit Court erred in per-

mitting the following question propounded by the plaintiff to Charles Eddy:

"Q. And deliver them yourselves?"

The question was objected to by counsel for defendant on the statutory grounds (Revised Statutes, Sections 724 and 860). The objection was overruled, to which ruling the defendant duly excepted.

The witness answered:

"A. We make lithographs in colors. That has been the business of our company since its incorporation since before 1901."

300 III. Error in not determining that the Circuit Court erred in permitting the following question propounded by the plaintiff to Charles Eddy:

"Q. Now, how long have you been doing business with the American Tobacco Company?"

The question was objected to by counsel for the defendant on the ground that the defendant and the witness was protected under Sections 724 and 860 of the Revised Statutes and the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States. The objection was overruled and thereupon duly excepted. The witness answered, among other things:

"A. Several years; I should say eight or ten years. I do not know of deliveries of lithographic matter to them."

IV. Error in not determining that the Circuit Court erred in permitting the following question propounded by the plaintiff to Charles Eddy:

"Q. What was his position with the company previous to that time?"

The witness declined to answer on the ground that it tended to inflict a penalty of forfeiture upon the American Lithographic Company, and thus upon him as a stockholder. Under the previous direction of the Court and the agreement of counsel the objection by the defendant to the question on the grounds of Sections 724 and 860 of the Revised Statutes and the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States also applied. The defendant's objections were overruled and the witness was directed to answer, and under the said general direction

301 of the Court and agreement of counsel the defendant excepted to such ruling. The witness answered.

"A. He was a salesman. I do not know what he sold. We do printing.

V. Error in not determining that the Circuit Court erred in requiring the witness Charles Eddy to produce, under a subpœna *duces tecum*, the books, papers and accounts of the defendant, to which the defendant objected, on the ground that the service of the subpœna did not conform to the sections of the Code of Procedure of the State of New York in respect of the person served, in respect of the description of the books and papers, and in respect of the time elapsing between the service and the return day of the subpœna. The objections were overruled, to which ruling the defendant excepted.

VI. Error in not determining that the Circuit Court erred in adjudging the witness to be guilty of open contempt of court and in committing the witness to the custody of the Marshal and directing him to be imprisoned because the witness refused to hand over the minute book of the defendant to the Court. The defendant declined to produce books and papers on the ground that the Court was without authority to require the production; that the time allowed was insufficient; that the description of the books and papers were too comprehensive; that the order was improvident in that respect, and that the witness was privileged under Section 724. Subsequently, the witness did deliver to the Court, under the defendant's protest and objection, the minute book.

VII. Error in not determining that the Circuit Court erred
302 in permitting the following question propounded by the plaintiff to Louis Ettlinger, the treasurer of the defendant:

"Q. What was the system of the American Lithographic Company during the years 1901 and 1902, with reference to keeping a record of the matters manufactured by it?"

The question was objected to by the defendant on the ground that the witness was privileged from answering in view of the nature of the action, and was protected by the Fourth and Fifth Amendments to the Constitution of the United States, and under the general rule that in actions of this nature the defendant was protected from discovery by its officers, and that it might tend to subject the witness to a penalty, and it then appearing that the witness was a stockholder of defendant company, defendant objected on the further ground that an answer to the question would subject the witness to penalty as well as the company of which he was an officer. The objection was overruled, to which ruling the defendant excepted.

The witness answered:

"A. Well, the records are kept in the manufacturing department and in the auditing department."

VIII. Error in not determining that the Circuit Court erred in permitting the following question propounded by the plaintiff to the witness Louis Ettlinger:

"Q. How long have you known him to be a salesman for your company, in what years?"

The question was objected to by counsel for the defendant on the same grounds as a prior question, viz., that the witness was privileged from answering in view of the nature of the action,
303 and was protected by the Fourth and Fifth Amendments to the Constitution of the United States, and under the general rule that in actions of this nature the defendant was protected from discovery by its officers, and that it might tend to subject the witness to a penalty, which objection was overruled, and to which ruling the defendant excepted.

The witness answered:

"A. I suppose I have known him for about eight years past in the character of a salesman for my company. He is not now in the employ of my company."

IX. Error in not determining that the Circuit Court erred in

ordering, requiring and compelling the defendant, at the instance of the plaintiff, and also of its own motion for the benefit of plaintiff, to produce its books of account, and its secretary, Charles Eddy, to testify therefrom, and to give in evidence therefrom entries contained therein in aid of proving the plaintiff's complaint, all against the protest and objection of the defendant that such production was compulsory and violated the defendant's rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and under Section 724 of the Revised Statutes, and that the defendant was otherwise privileged, to which orders and requirements and evidence the defendant duly excepted. The defendant had also objected to the said witness answering any question which might tend to render the defendant liable to a penalty on the ground of Section 860 of the Revised Statutes, as well as Section 724, and the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, and it has been agreed to by the plaintiff and directed by the Court that the defendant might regard every
304 question to be under the same objection, ruling and exception.

X. Error in not determining that the Circuit Court erred in permitting the following question propounded by the plaintiff to Charles Eddy:

"Q. Please let us know what is the next item that you find?"

The question was objected to by counsel for the defendant because it required the witness, who was the secretary of the defendant, to read in evidence entries from the books of the defendant, and on the ground that giving such evidence violated the defendant's rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and under Section 724 of the Revised Statutes, and that the defendant was otherwise privileged. The defendant had also objected to the said witness answering any question which might tend to render the defendant liable to a penalty on the ground of Section 860 of the Revised Statutes, as well as Section 724, and the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, and it had been agreed to by the plaintiff and directed by the Court that the defendant might regard every question to be under the same objection, ruling and exception. The objection was overruled, and thereupon defendant duly excepted. The witness answered, among other matters:

"1,000 show cards Old English Curve cut $50. 1,000 show cards shipped to Deuther Manufacturing Company. Not paid. Buffalo, N. Y."

XI. Error in not determining that the Circuit Court erred
305 in permitting the following question propounded by the plaintiff to Charles Eddy:

"Please let us know what is the next item that you find?"

The question was objected to by counsel for the defendant because it required the witness, who was the secretary of the defendant, to read in evidence to the jury entries from the books of the defendant, and on the ground that giving such evidence violated the defendant's rights under the Fourth, Fifth and Fourteenth Amendments to the

Constitution of the United States and under Section 724 of the Revised Statutes, and that the defendant was otherwise privileged. The defendant had also objected to the said witness answering any question which might tend to render the defendant liable to a penalty on the ground of Section 860 of the Revised Statutes as well as Section 724, and the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, and it has been agreed to by the plaintiff and directed by the Court that the defendant might regard every question to be under the same objection, ruling and exception. The objection was overruled and thereupon the defendant duly excepted.

The witness answered, among other matters:

"A. Day book 5, page 589, May 10, 1902, American Tobacco Company. 25 Old English Curve Cut hangers at 5¢ each (without any tubes) $1.25. 25 tubes at 1½¢ .38 $1.63. Same book, page 614. May 17, 1902. American Tobacco Company. 1000 show cards Old English Curve Cut $50. American Tobacco Company 50 Old English Curve Cut show cards, 5¢ each (select and tinned) $2.50. To tinning at $13 a thousand .65 $3.15. American Tobacco Company.
750. Here's to Old English hangers, at 5¢ $37.50. Tinning
306 at $13. a thousand 9.75 $47.25. American Tobacco Company.
1200 Here's to Old English hangers $60.00. To tinning at $13. a thousand, 15.60 $75.60. Page 614 1000 show cards—that item there—shipped to Deuther Manufacturing Company. Not paid. J 9033, Buffalo, N. Y. Page 643 May 24, 1902. American Tobacco Company. 1500 Old English Curve Cut show cards at 5¢ each $75. Shipped to Deuther Manufacturing Company, Buffalo, N. Y. Not paid. 500 to D. H. Hall, St. Louis, Mo., $1.22. 200 to M. V. Shallcross, Louisville, Ky., .75. 500 to S. S. Goodloe, Pittsburgh, Pa., .63 J 9033. Page 652. same book. May 27, 1902, American Tobacco Company 1,300. Here's to Old English hangers at 5¢ each, $65. Tinning at $13 a thousand 16.90. Freight 1.45 $81.90. 500 to Ira Stover, Chicago, Ill., via S. U. .98. 500 to E. S. Dusel, Boston, Mass., via Met., .29. 300 to H. K. Ramsey, Bound Brook, N. J., M. J. C. .18 $1.45. Page 661 May 29, 1902, American Tobacco Company. 1,000 Here's to old English at 5¢ each 50.00. To tinning 13.00 $63.00. Shipped to A. J. Fitzsimmons. Frt. 1.46 J 9033. Page 667 May 31, 1902, American Tobacco Company 3 show cards. Here's to Old English at 1.67 ea. 5.01 (mounted on satin) deld. to City. Day Book No. 6, page 17, June 3, 1902, American Tobacco Company. 1,000 Here's to Old English hangers at 5¢ each 50.00. To tinning at $13 a thousand 13.00 $63.00. Delivered to Charles Dushkind, City. Page 30, June 6, 1902, American Tobacco Company. 500 Here's to Old English hangers at 5¢ each 25.00. Tinned at $13 a thousand 6.50 $31.50. Shipped to C. C. Heldman, Detroit, Mich. Page 36 June 7, 1902, American Tobacco Company. To freight charges on 500 Here's to Old English hangers shipped 5240 2.81. Page 78 June 19, 1902. 3 Bills American Tobacco
307 Company 200 Old English Curve Cut hangers at 5¢ each 10.00. To tinning $13 a thousand 2.60 $12.60. Shipped to M. B. Shallcross 75¢ J 9033 Louisville, Ky. Page 83 June 20, 1902,

3 Bills American Tobacco Company. 100 Here's to Old English cards (No lettering and no tinning) at 5¢ each 5. Delivered to Mr. Wilson Order J 9033 111 Fifth Avenue Page 131 June 30, 1902, W A S 417¢ American Tobacco Company 10 Old English Curve Cut show cards Mounted on Satin at 1.67 each 16.70 10 tubes at 2 cents each, .20 $16.90 Delivered to Mr. Wilson J 9033.

XII. Error in not determining that the Circuit Court erred in permitting the following question propounded by the plaintiff to Charles Eddy:

"Q. Can you produce the ledgers in which these entries were posted?"

The question was objected to by counsel for the defendant because it required the witness, who was the secretary of the defendant, to read in evidence to the jury entries from the books of the defendant, and on the ground that giving such evidence violated the defendant's rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and under Section 724 of the Revised Statutes, and that the defendant was otherwise privileged. The defendant had also objected to the said witness answering any question which might tend to render the defendant liable to a penalty on the ground of Section 860 of the Revised Statutes, as well as Section 724, and the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, and it had been agreed to by the plaintiff and directed by the Court that the defendant might regard every question to be under the same objection, ruling and exception. The objection was overruled and thereupon the de-
308 fendant duly excepted.

The witness answered:

"A. I have the ledgers between the periods, sir."

XIII. Error in not determining that the Circuit Court erred in permitting the following question propounded by the plaintiff to Charles Eddy:

"Q. Will you look over the account and compare it with the list of items?"

The question was objected to by counsel for the defendant because it required the witness, who was the secretary of the defendant, to read in evidence to the jury entries from the books of the defendant and on the ground that giving such evidence violated the defendant's rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and under Section 724 of the Revised Statutes, and that the defendant was otherwise privileged. The defendant had also objected to the said witness answering any question which might tend to render the defendant liable to a penalty on the ground of Section 860 of the Revised Statutes, as well as Section 724, and the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, and it had been agreed to by the plaintiff and directed by the Court that the Defendant might regard every question to be under the same objection, ruling and exception. The objection was overruled and thereupon the defendant duly excepted.

The witness answered, among other matters:

"A. The item of May 10, 1902, on page 589, on day book No. 5, amount $1.63. There is an item posted in the ledger under that date, page No. 25, ledger A to L, No. 2, for $1.63, under that date, May 10, 1902."

309 XIV. Error in not determining that the Circuit Court erred in permitting the following question propounded by the plaintiff to Charles Eddy:

"Q. Now, will you please make the same comparison with reference to the subsequent entries, all of them?"

The question was objected to by counsel for the defendant because it required the witness, who was the secretary of the defendant, to read in evidence to the jury entries from the books of the defendant, and on the ground that giving such evidence violated the defendant's rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and under Section 724 of the Revised Statutes, and that the defendant was otherwise privileged. The defendant had also objected to the said witness answering any question which might tend to render the defendant liable to a penalty on the ground of Section 860 of the Revised Statutes as well as Section 724, and the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, and it had been agreed to by the plaintiff and directed by the Court that the defendant might regard every question to be under the same objection, ruling and exception. The objection was overruled and thereupon the defendant duly excepted.

The witness answered, among other things:

"A. The next one is on page 614, under date of May 17, 1902, $50. Such an item is posted in the ledger on the same page. The next item is on page 638, under date of May 23, 1902, amounting to $3.15. Such an item is posted to page 26 of the ledger. The next item is on page 642 of the day book, which amounts to $47.25. Another item of $2.81, which I presume is freight. That item of $47.25 was correctly posted on that page. They seem to

310 have omitted it at that time and to have inserted it later. An item of May 24, of $75, posted to page 26 of the ledger. Page 646, May 26, 1902, item of $75.60 and $2.60 for freight. That is posted as one item, $78.20, on page 26. Page 652, May 27, 1902, $81.90, and $1.45, which is freight, that is posted as one item of $83.35 on page 26. Page 661, May 29, 1902, an item of $63 and $1.46 for freight. That is posted on page 26. Page 667, May 31, 1902, item of $5.01. That is posted on page 26. Day Book No. 6, page 717, June 3, 1902, item of $63. It is posted at page 215 of the same ledger. Page 30, June 6, an item of $31.50, and 83 cents for freight. That is posted as one item at page 215. Page 36, June 7, 1902, an item of $2.81 for freight. I find that item on page 26. Page 78, June 19, 1902, an item of $12.60 and another item of 75 cents. That is posted as one item at page 215. Page 83, June 20, 1902, there is an item of $5. That is posted on page 216. Page 131, June 30, 1902, an item of $16.90. That is posted on page 216. That is all, sir."

XV. Error in not determining that the Circuit Court erred in per-

mitting the following question propounded by the plaintiff to Charles Eddy:

"Q. You find they were all carried in the ledger?"

The question was objected to by counsel for the defendant because it required the witness, who was the secretary of the defendant, to read in evidence to the jury entries from the books of the defendant, and on the ground that giving such evidence violated the defendant's rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and under Section
311 724 of the Revised Statutes, and that the defendant was otherwise privileged. The defendant had also objected to the said witness answering any question which might tend to render the defendant liable to a penalty on the ground of Section 860 of the Revised Statutes as well as Section 724, and the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States, and it has been agreed to by the plaintiff and directed by the Court that the defendant might regard every question to be under the same objection, ruling and exception. The objection was overruled, and thereupon the defendant duly excepted.

The witness answered among other matters:

"A. All carried in the ledger, sir."

XVI. Error in not determining that the Circuit Court erred in permitting the following questions propounded by the plaintiff to Charles Eddy:

"By Mr. KNAUTH:

Q. Will you please look on the other side of the ledger account and tell us whether these several items which you have read therefrom are marked as paid for by the American Tobacco Company?"

Which question the Court supplemented by the following direction:

"The COURT: Whether the American Tobacco Company is credited with having paid for them on the books of this defendant?"

And also by the following direction:

"By the COURT:

Q. Well, you may give the credits that do appear, credits given by the American Lithographic Company to the American Tobacco Company? Read the dates and credits."

After which the question was amended by plaintiff's counsel as follows:

312 "Mr. KNAUTH: After the date of July 17, 1901, yes; after the first charge; commence with the date of the first charge and give the credit."

And the Court further supplemented the question by the following directions:

"Q. Yes. Read them all off—that is, what is competent, anyway; those credits that appear on those books. That is evidence—some evidence at least—that the American Tobacco Company paid those amounts to the American Lithographic Company; that is the evidence."

The question was objected to by counsel for the defendant because it required the witness, who was the secretary of the defendant, to read in evidence to the jury entries from the books of the defendant, and on the ground that giving such evidence violated the defendant's rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and under Section 724 of the Revised Statutes, and that the defendant was otherwise privileged. The defendant had also objected to the said witness answering any question which might tend to render the defendant liable to a penalty on the ground of Section 860 of the Revised Statutes as well as Section 724, and the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, and it had been agreed to by the plaintiff and directed by the Court that the defendant might regard every question to be under the same objection, ruling and exception. The objection was overruled, and thereupon the defendant duly excepted.

The witness answered among other things:

"A. May 10, 1902, 129.12; May 13, 416.11; May 15, 2,101.58; May 20, 3,668.97; May 22, 393.92; May 27, 152.49; May
313 21, 78.34; May 22, 38.05; May 29, 79.64; June 3, 41.98; June 5, 235; June 7, 346.71; June 12, 813.54; June 14, 353.16; June 7, 45.96; June 9, 693; June 18, 34.87; June 18, 307.19; June 19, 3,848.92; June 19, 720.36; June 20, 105.52; June 24, 513.29; June 27, 1,127.11; June 30, 318.06; July 3, 889.66; July 3, 904.30; July 7, 17.09; July 9, 182.53; July 10, 655.06; July 11, 182.68; July 14, 50.50; July 15, 81.40; July 16, 219.41; July 16, 3, 335.34; July 18, 1,012.12; July 23, 207.70; July 25, 721.41; July 29, 1, 122.47; August 2, 20.54; August 6, 3,420.88; August 8, 5,098.47; August 9, 2,821.38; August 13, 1,042.55; August 15, 2, 191.11; August 15, 649.02; August 19, 51.48; August 20, 1,099.93; August 22, 826.59; August 22, 10.; August 26, 657.76; August 26, .06; August 23, 40.; August 28, 320.50; August 29, 791.53; September 1, 338.98; September 5, 1,099.27; September 9, 539.65; September 10, 3,506.54; September 11, 1,295.75; September 15, 790.42; September 19, 654.35; September 20, 50.06; September 20, 5.00; September 20, 16.90; September 26, 840.83; October 1, 1.07; October 2, 2,150.09; October 8, 10.08; October 9, 652.66; October 14, 64.86; October 17, 1,351.16; October 18, 2,633.16; October 24, 1,096.66; October 24, 2,276.49; October 24, .10; October 30, 14.70; October 31, 2,010.23; October 31, 11.78; November 6, 68.63; November 7, 38.75; November 7, .20; November 7, 1,218.55; November 11, 997.37; November 13, 270.76; November 13, 918.76; November 14, 470.50; November 19, 35.; November 21, 300.87; November 28, 339.30; December 5, 856.06; December 9, 234.74; December 11, 590.; December 12, 24.60; December 19, 619.08; December 23, 855.20; December 24, 1,253.86; December 30, 402.19; December 31, 10.75; December 31, 1,493.38; December 31, 30."

314 XVII. Error in not determining that the Circuit Court erred in permitting the following question propounded by the plaintiff to Charles Eddy:

"Q. When was the account balanced after May 10, 1902?"

The question was objected to by counsel for the defendant because it required the witness, who was the secretary of the defendant, to read in evidence to the jury entries from the books of the defendant, and on the ground that giving such evidence violated the defendant's right's under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and under Section 724 of the Revised Statutes, and that the defendant was otherwise privileged. The defendant had also objected to the said witness answering any question which might tend to render the defendant liable to a penalty on the ground of Section 860 of the Revised statutes as well as Section 724, and the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, and it had been agreed to by the plaintiff and directed by the Court that the defendant might regard every question to be under the same objection, ruling and exception. The objection was overruled and thereupon defendant duly excepted.

The witness answered among other matters:

"A. A balance was struck June 30, 1902. The balance was then carried forward."

XVIII. Error in not determining that the Circuit Court erred in permitting the following question propounded by the plaintiff to Charles Eddy:

"Q. How much was it then; what balance was carried forward?"

The question was objected to by counsel for the defendant because it required the witness, who was the secretary of the
315 defendant, to read in evidence to the jury entries from the books of the defendant, and on the ground that giving such evidence violated the defendant's rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and under Section 724 of the Revised Statutes, and that the defendant was otherwise privileged. The defendant had also objected to the said witness answering any question which might tend to render the defendant liable to a penalty on the ground of Section 860 of the Revised Statutes as well as Section 724 and the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, and it had been agreed to by the plaintiff and directed by the Court that the defendant might regard every question to be under the same objection, ruling and exception. The objection was overruled, and thereupon the defendant duly excepted.

The witness answered, among other things:

"A. $9,123.64. That amount was still owing by the American Tobacco Company to our company. The next balance was December 31, 1902. The balance then was $1,260.05. It says by balance to some other ledger. The balance brought forward was $1,260.05. The next balance seems to be on June 30, 1903, $13,362.31."

XIX. Error in not determining that the Circuit Court erred in propounding the following question to Charles Eddy:

Q. By the COURT:

"Q. Give the next one. I do not see that that is helping it out, except inferentially. They do not seem to have paid up in full."

The question was objected to by counsel for the defendant because it required the witness, who was the secretary of the
316 defendant, to read in evidence to the jury entries from the books of the defendant and on the ground that giving such evidence violated the defendant's rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and under Section 724 of the Revised Statutes, and that the defendant was otherwise privileged. The defendant had also objected to the said witness answering any question which might tend to render the defendant liable to a penalty on the ground of Section 860 of the Revised Statutes, as well as Section 724, and the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, and it had been agreed to by the plaintiff and directed by the Court that the defendant might regard every question to be under the same objection, ruling and exception. The objection was overruled, and thereupon the defendant duly excepted.

The witness answered, among other things:

"A. Balance December 31, 1903, $16,947.45. Balance on June 30, 1904, $872.27."

XX. Error in not determining that the Circuit Court erred in propounding the following question to Charles Eddy:

"Q. What is your next balance. See if you can find one?"

The question was objected to by counsel for the defendant because it required the witness, who was the secretary of the defendant, to read in evidence to the jury entries from the books of the defendant, and on the ground that giving such evidence violated the defendant's rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and under
317 Section 724 of the Revised Statutes, and that the defendant was otherwise privileged. The defendant had also objected to the said witness answering any question which might tend to render the defendant liable to a penalty on the ground of Section 860 of the Revised Statutes as well as Section 724, and the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, and it had been agreed to by the plaintiff and directed by the Court that the defendant might regard every question to be under the same objection, ruling and exception. The objection was overruled, and thereupon the defendant duly excepted.

The witness answered among other things:

"A. We are up to December 31st—No, that was June 30, 1904. Yes, there is one more balance after that. On December 31, 1904, balance $71.57."

XXI. Error in not determining that the Circuit Court erred in permitting the following question propounded by the plaintiff to Charles Eddy:

"Q. I suppose the books you have produced, the ledgers and the day books, are the ordinary books kept of accounts of the defendant company."

The question was objected to by counsel for the defendant because it required the witness, who was the secretary of the defendant, to read in evidence to the jury entries from books of the defendant, and on the ground that giving such evidence violated the defendant's rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and under Section 724 of the Revised Statutes, and that the defendant was otherwise privileged. The defendant had also objected to the said witness answering any question which might tend to render the defendant liable to
318 a penalty on the ground of Section 860 of the Revised statutes, as well as Section 724, and the Fourth, Fifth and Fourteenth amendments to the Constitution of the United States, and it had been agreed to by the plaintiff and directed by the Court that the defendant might regard every question to be under the same objection, ruling and exception. The objection was overruled, and thereupon the defendant duly excepted.

The witness answered, among other things:

"A. Yes, sir."

XXII. Error in not determining that the Circuit Court erred in permitting the following question propounded by the plaintiff to Charles Eddy:

"Q. And so far as you know they were correct?"

The question was objected to by counsel for the defendant, because it required the witness, who was the secretary of the defendant, to read in evidence to the jury entries from the books of the defendant, and on the ground that giving such evidence violated the defendant's rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and under Section 724 of the Revised Statutes, and that the defendant was otherwise privileged. The defendant had also objected to the said witness answering any question which might tend to render the defendant liable to a penalty, on the ground of Section 860 of the Revised Statutes, as well as Section 724, and the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, and it had been agreed to by the plaintiff and directed by the Court that the defendant might regard every question to be under the same objection, ruling and exception. The objection was overruled and thereupon the
319 defendant duly excepted.

The witness answered, among other matters:

"A. Yes, sir."

XXIII. Error in not determining that the Circuit Court erred in receiving in evidence the summons, amended complaint, answer, reply, minutes of trial and judgment, constituting the judgment roll in an action brought in the United States Circuit Court for the Southern District of New York by Emil Werckmeister against the American Tobacco Company (Plaintiff's Exhibit P).

The papers were objected to by counsel for the defendant, on the ground that the same were incompetent against the defendant, irrelevant to any issue in the case and immaterial. The objection was overruled and the defendant excepted.

XXIV. Error in not determining that the Circuit Court erred in

receiving in evidence the bill of complaint in a suit brought in the Circuit Court for the Southern District of New York by Emil Wereckmeister against the American Tobacco Company and the American Lithographic Company, and the answer of the American Tobacco Company in said suit.

To which papers the defendant objected on the ground that they were incompetent and irrelevant as against the defendant. The objection was overruled and thereupon defendant duly excepted.

XXV. Error in not determining that the Circuit Court erred in permitting the following question propounded by the plaintiff to Percival S. Hill:

"Q. You know that you are indemnified by some agreement on the part of the American Lithographic Company, too, to
320 keep you indemnified?"

The question was objected to by counsel for the defendant as incompetent, immaterial and irrelevant, assuming matters not true and also stating conclusions. The objection was overruled and thereupon defendant duly excepted.

The witness answered.

"A. I know from statements made. I have seen no papers. Nothing has come under my personal observation in regard to it."

XXVI. Error in not determining that the Circuit Court erred in permitting the following question propounded by the plaintiff to Percival S. Hill:

"Q. Were the facts to which you swore on July 22, 1903, true to the best of your knowledge?"

The answer being the answer of the American Tobacco Company to the bill of complaint of Emil Wereckmeister in a suit brought by said Emil Wereckmeister against the American Tobacco Company and the American Lithographic Company.

The question was objected to on the ground that the matter was immaterial and incompetent as against the defendant and irrelevant to any issue on the case and an improper way of eliciting testimony. The objection was overruled. The defendant excepted.

The witness answered:

"They were."

XXVIII. Error in not determining that the Circuit Court erred in permitting the following question propounded by the plaintiff to said Percival S. Hill:

321 "Q. Now, please state whether the facts stated in the answer of your company, the American Tobacco Company (Plaintiff's Exhibit Q), and which answer was signed by you were true, according to the best of your knowledge at the time?"

The question was objected to by counsel for the defendant, on the ground that the matter inquired for is matter that is incompetent and irrelevant against the defendant and improper way of eleciting testimony. The statement therein made was made upon information, rendering the matter incompetent against the defendant. The objection was overruled and the defendant duly excepted.

The witness answered:

"They were."

XXIX. Error in not determining that the Circuit Court erred in refusing to grant the defendant's motion, upon the conclusion of the plaintiff's evidence, that the complaint be dismissed or that a verdict for the defendant be directed, on the ground that the plaintiff had no statutory right to take the copyright alleged in the complaint, he not being authorized under Section 4962 of the Revised Statutes to take the copyright, not being the author, inventor, designer or proprietor of the painting, nor the assigns of such person, to which refusal of the Court to grant said motion the defendant duly excepted.

XXX. Error in not determining that the Circuit Court erred in refusing to grant the defendant's motion, upon the conclusion of the plaintiff's evidence, that the complaint be dismissed, or that a verdict for the defendant be directed, on the ground that the plaintiff had no right to maintain the action on the copyright mentioned in the complaint, because neither the painting nor the sub-
322 stance on which the same was mounted was inscribed with the notice required by Section 4962, to which refusal of the Court to grant said motion the defendant duly excepted.

XXXI. Error in not determining that the Circuit Court erred in refusing to grant the defendant's motion, upon the conclusion of the plaintiff's evidence, that the complaint be dismissed, or that a verdict for the defendant be directed, on the ground that the plaintiff had no right to maintain the action on the copyright, because the painting was published both by public exhibition of the painting itself and by the publication of photogravures of it, and neither the painting nor the substance on which the same was mounted was inscribed with the notice required by Section 4962, to which refusal of the Court to grant said motion the defendant duly excepted.

XXXII. Error in not determining that the Circuit Court erred in refusing to grant the defendant's motion, upon the conclusion of the plaintiff's evidence, that the complaint be dismissed, or that a verdict for the defendant be directed, on the ground that there was no evidence in the case of any copies of the painting which were in the possession of the defendant or by it sold or exposed for sale within the meaning of Section 4965, to which refusal of the Court to grant said motion the defendant duly excepted.

XXXIII. Error in not determining that the Circuit Court erred in refusing to grant the defendant's motion, upon the conclusion of the plaintiff's evidence, that the complaint be dismissed or that a verdict for the defendant be directed, on the ground that
323 there was no evidence of any copy of the painting as distinguished from photographs or photogravures having been in the possession of the defendant or by it made, sold or exposed for sale, to which refusal of the Court to grant said motion the defendant duly excepted.

XXXIV. Error in not determining that the Circuit Court erred in refusing to grant the defendant's motion, upon the conclusion of the plaintiff's evidence, that the complaint be dismissed or that a verdict for the defendant be directed on the ground that the allegations of the complaint were not proved and that defendant was not

shown guilty and liable to penalties or forfeitures, to which refusal of the Court to grant said motion the defendant duly excepted.

XXXV. Error in not determining that the Circuit Court erred in refusing to grant the defendant's motion, upon the conclusion of the plaintiff's evidence, that the complaint be dismissed, or that a verdict for the defendant be directed, on the ground that there was no evidence that any of the alleged infringing sheets were made, worked, printed or copied by the defendant since July 17, 1901, and that the cause of action, if any, accrued by reason of the copying, printing or working, and there was no evidence that that was done within two years from July 17, 1901.

AMERICAN LITHOGRAPHIC COMPANY,
By WETMORE & JENNER, *Its Solicitors,* &
By WM. A. JENNER, *Counsel.*

324 (Endorsed:) United States Supreme Court. American Lithographic Company vs. Emil Werckmeister. Assignments of Error. Wetmore & Jenner, Solicitors for Pl'ff in Error, 34 Pine St., New York. Copy Received Dec. 4, 1908. Briesen & Knauth. United tSates Circuit Court of Appeals, Second Circuit. Filed Dec. 5, 1908. William Parkin, Clerk. Service of copy of within assignments of error this 4th day of December, 1908, is hereby admitted.

325 United States Circuit Court of Appeals for the Second Circuit.

AMERICAN LITHOGRAPHIC COMPANY, Plaintiff in Error,
against
EMIL WERCKMEISTER, Suing for Himself and the UNITED STATES, Defendant in Error.

Know all men by these presents, That we, American Lithographic Company, as principal, and the National Surety Company, a corporation organized under the laws of the State of New York, and having an office and principal place of business at No. 115 Broadway, Borough of Manhattan, City and State of New York, as surety, are held and firmly bound unto the above named defendant-in-error, Emil Werckmeister, in the sum of Thirteen thousand ($13,000) Dollars, to be paid to the said Emil Werkmeister, his executors, administrators and assigns, for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated the third day of December, one thousand nine hundred and eight.

Whereas, the above named American Lithographic Company has prosecuted a writ of error to the Supreme Court of the United States, to reverse the order of affirmance rendered in the above entitled action on the 27th day of November, 1908 in the United States Circuit Court of Appeals in and for the Second Circuit.

Now, therefore, the condition of this obligation is such that if the above named American Lithographic Company shall prosecute the said writ of error to effect and answer all damages and costs if it shall fail to make said plea good, then this obligation shall be
326 void; otherwise, the same shall be and remain in full force and virtue.

AMERICAN LITHOGRAPHIC COMPANY,
By ROBERT M. DONALDSON, *Vice-Pres't.*
NATIONAL SURETY COMPANY,
By JOEL RATHBONE, *Vice-President.*

Attest:
[L. S.] WM. A. THOMPSON,
Assistant Secretary.

Sealed and delivered this third day of December, 1908.
[SEAL.] J. S. CAMPBELL.

STATE OF NEW YORK,
County of New York, ss:

On the 3d day of December in the year 1908, before me personally came Robert M. Donaldson, to me known, who being by me duly sworn did depose and say that he resides in New York City; that he is the Vice-President of American Lithographic Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

[SEAL.] J. S. CAMPBELL,
Notary Public, Queens County.

Certificate filed in New York County.

327 *Affidavit, Acknowledgment, and Justification by Guarantee or Surety Company.*

STATE OF NEW YORK,
County of New York, ss:

On this 3rd day of December, one thousand nine hundred and eight before me personally came Joel Rathbone, known to me to be the Vice-President of the National Surety Company, the corporation described in and which executed the within and foregoing Bond of American Lithographic Company as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Vice-President of said Company, and knows the corporate seal thereof; that the said National Surety Company is duly and legally incorporated under the laws of the State of New York; that said Company has complied with the provisions of the Act of Congress of August 13th 1894; that the seal affixed to the within Bond of American Lithographic Company is

the corporate seal of said Company, and was thereto affixed by order and authority of the Board of Directors of said Company, and that he signed his name thereto by like order and authority as Vice-President of said Company, and that he is acquainted with Wm. A. Thompson and knows him to be the Assistant Secretary of said Company; and that the signature of said Wm. A. Thompson subscribed to said Bond is in the genuine handwriting of said Wm. A. Thompson, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of One million dollars.

That William J. Griffin is our agent to acknowledge service in the Judicial District wherein this Bond is given.

JOEL RATHBONE.
(Deponent's Signature.)

Sworn to, acknowledged before me, and subscribed in my presence this 3rd day of December, 1908.

[SEAL.] H. E. EMMETT,
(Officer's signature, description and seal.)
Notary Public for County of Kings.

Certificate filed in New York, Queens, Richmond and Westchester Counties.

328 *Affidavit, Acknowledgment, and Justification by Guarantee or Surety Company.*

STATE OF NEW YORK,
County of New York, ss:

On this 3rd day of December, one thousand nine hundred and eight before me personally came Joel Rathbone, known to me to be the Vice-President of the National Surety Company, the corporation described in and which executed the within and foregoing Bond of American Lithographic Company as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Vice-President of said Company, and knows the corporate seal thereof; that the said National Surety Company is duly and legally incorporated under the laws of the State of New York; that said Company has complied with the provisions of the Act of Congress of August 13th 1894; that the seal affixed to the within Bond of American Lithographic Company is the corporate seal of said National Surety Company, and was thereto affixed by order and authority of the Board of Directors of said Company, and that he signed his name thereto by like order and authority as Vice-President of said Company, and that he is acquainted with Wm. A. Thompson and knows him to be the Assistant Secretary of said Company; and that the signature of said Wm. A. Thompson subscribed to said Bond is in the genuine handwriting of said Wm.

A. Thompson, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of One Million dollars.

That —— —— is our agent to acknowledge service in the Judicial District wherein this Bond is given.

JOEL RATHBONE.
(*Deponent's Signature.*)

Sworn to, acknowledged before me, and subscribed in my presence this 3rd day of December, 1908.

[L. S.] WM. M. WEAVER,
Officer's signature, description and seal.)
Notary Public for County of New York.

Certificate filed in Kings, Queens, Richmond and Westchester Counties.

329 (Endorsed:) American Lithographic Company v. Emil Werckmeister. Bond. Approved as to form and also as to sufficiency of sureties, with reservations, however, to the defendant in error of the right at any time to examine the proper officers of the Surety Company under oath as to its assets, liabilities, and financial condition generally. E. A. Lacombe, U. S. Circuit Judge. United States Circuit Court of Appeals Second Circuit. Filed Dec. 5, 1908. William Parkin, Clerk.

330 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 332 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of American Lithographic Company, against Emil Werckmeister, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 9th day of December in the year of our Lord One Thousand Nine Hundred and Eight and of the Independence of the said United States the One Hundred and thirty-third.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WILLIAM PARKIN, *Clerk.*

331 By the Honorable E. Henry Lacombe, one of the Judges of the United States Circuit Court of Appeals for the Second Circuit, to Emil Werckmeister, Greeting:

You are hereby cited and admonished to be and appear before a United States Supreme Court, to be holden at the Capitol in the city

of Washington, on the 3rd day of January, 1909, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of Appeals of the United States for the Second Circuit, wherein American Lithographic Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand in the Borough of Manhattan, City of New York, in the District and Circuit above named, on this 4th day of December, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States of America the one hundred and thirty-third.

E. HENRY LACOMBE,
Judge of the United States Circuit Court of Appeals for the Second Circuit.

332 [Endorsed:] U. S. Circuit Court of Appeals, Second Circuit. American Lithographic Company, Plaintiff-in-error, vs. Emil Wereckmeister, Defendant-in-error. Original. Citation. Wetmore & Jenner, Solicitors for Plaintiff in error, 34 Pine St., New York. United States Circuit Court of Appeals, Second Circuit. Filed Dec. 5, 1908. William Parkin, clerk. Copy Received, Dec. 4, 1908. Briesen & Knauth. Service of copy of within citation this 4th day of Dec., 1908, is hereby admitted.

333 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of plea which is in the said United States Circuit Court of Appeals before you or some of you, between the American Lithographic Company, plaintiff in error, and Emil Wereckmeister, defendant in error, a manifest error hath happened, to the great damage of the said American Lithographic Company, as is said and appears by its complaint, we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the Supreme Court of the United States, at the Capitol in the city of Washington, together with this writ, so that you may have the same at the said place before the justices aforesaid on the 3d day of January, 1909, that the record and proceedings aforesaid being inspected the said justices of the Supreme Court may cause further to be done therein to correct that error which of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice
334 of the Supreme Court of the United States, this 4th day of December, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States of America the one hundred and thirty-second.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the Circuit Court of Appeals of the United States of America for the Second Circuit.

The foregoing writ is hereby allowed.

E. HENRY LACOMBE,
U. S. Circuit Judge.

335 [Endorsed:] U. S. Circuit Court of Appeals, Second Circuit. American Lithographic Company, Plaintiff-in-error, vs. Emil Werckmeister, Defendant-in-error. Original. Writ of error. Wetmore & Jenner, Solicitors for Plaintiff in error, 34 Pine St., New York. Copy received Dec. 4, 1908. Briesen & Knauth. Service of copy of within writ of error this 4th day of Dec., 1908, is hereby admitted.

Endorsed on cover: File No. 21,447. U. S. Circuit Court Appeals, 2d Circuit. Term No. 115. American Lithographic Company, plaintiff in error, vs. Emil Werckmeister. Filed December 17th, 1908. File No. 21,447.

Supreme Court, U. S.
FILED
MAR 14 1911
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

No. 115.
OCTOBER TERM, 1910.

THE AMERICAN LITHOGRAPHIC COMPANY,
Plaintiff in Error,
vs. (*Defendant below*),

EMIL WERCKMEISTER,
Defendant in Error,
(*Plaintiff below*).

Points for The American Lithographic Company, Plaintiff in Error, Defendant below.

WM. A. JENNER,
Counsel for Plaintiff in Error,
(*Defendant below*),
34 PINE STREET,
New York City.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

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Supreme Court of the United States,

No. 115, OCTOBER TERM, 1910.

THE AMERICAN LITHOGRAPHIC COMPANY,
Plaintiff in Error
(Defendant below),

vs.

EMIL WERCKMEISTER,
Defendant in Error,
(Plaintiff below).

POINTS FOR THE AMERICAN LITHOGRAPHIC COMPANY, PLAINTIFF IN ERROR, DEFENDANT BELOW.

NOTE: *The references are to the top paging of the Record.*

This is a writ of error brought by the American Lithographic Company, plaintiff in error, defendant below, to reverse a judgment of the Circuit Court of Appeals for the Second Circuit affirming a judgment of the Circuit Court for the Southern District of New York, entered November 22, 1906, upon a verdict at a trial held November 2d to 9th, 1906, before Hon. GEORGE W. RAY, D. J., with a jury, for $10,000, with $90.44 costs, total $10,090.44 (Rec., p. 8).

The action was brought by Werckmeister, plaintiff below, under Rev. Stat. Section 4965 to recover penalties alleged to

have been incurred by reason of alleged infringement of a copyright of a *painting* owned by him.

The summons was issued and the action was brought July 17, 1903 (Rec., p. 2).

The Pleadings.

The amended complaint set forth that prior to April 2d, 1894, one Sadler, a British subject, designed a painting called "Chorus" (R., p. 3); that on April 2, 1894, said Sadler assigned to the plaintiff his right, title and interest in any copyright obtainable thereon (R., p. 3); that on April 16, 1894, plaintiff took proceedings to copyright the said painting in the United States (R., p. 3); that plaintiff gave notice of the copyright by inscribing on every copy published by him or on its mount the required statutory words (R., p. 4); that, within two years prior to commencing the action, defendant, without plaintiff's consent, copied, published and sold 30,100 copies of said copyrighted painting, in violation of said plaintiff's copyright (Clause Tenth, R., p. 4); that thereby defendant forfeited to the plaintiff and to the United States $10.

"for each and every sheet containing a copy of said painting "'Chorus,' made in violation of said plaintiff's copyright, and "sold, as aforesaid" (Clause Eleventh, R., p. 4); that by reason of the statute "an action has accrued to said plaintiff "to demand and have of and from the said defendant the said "penalty so forfeited and owing as last above specified" (Clause Twelfth, R., p. 4).

The defendant's answer denied all the allegations of the amended complaint upon information and belief, except that it was a corporation, and denied the allegations contained in the Tenth, Eleventh and Twelfth clauses of the amended complaint (Answer, R., p. 6). The answer further specially alleged that the plaintiff's alleged copyright was void because the plaintiff had not been the author, inventor, designer or proprietor of the said painting, nor the assignee thereof, and had no authority under the statute to obtain any copyright thereon, and further specially alleged that, if any such copyright was obtained, it was abandoned to the public, and no action thereon could be main-

tained as it had been publicly exhibited in England for about four months continuously prior without the statutory notice inscribed thereon, and that there never had been any such notice inscribed thereon (Answer, R., p. 6).

Upon the conclusion of plaintiff's evidence defendant moved that the court direct a verdict for the defendant on the grounds, briefly stated: 1st, that plaintiff had no statutory right to take the copyright; 2d, that plaintiff had no right to maintain the action for lack of inscription of notice; 3d, that plaintiff had no right to maintain the action because the painting had been published without inscription of notice thereon; 4th, that there was no evidence of any copies of the painting in the possession of the defendant or by it sold or exposed for sale within the meaning of Section 4965; 5th, that there was no evidence of any copy of the painting as distinguished from photographs or photogravures having been in possession of the defendant or by it made or exposed for sale; 6th, that the allegations of the complaint had not been proved and that the defendant had not been shown guilty and liable to the penalties; 7th, that there was no evidence that any of the alleged infringing sheets had been made, worked, printed or copied by the defendant since July 17, 1901 (within two years before commencing the action), that the cause of action, if any, accrued by reason of the copying, printing or working, and that there was no evidence that this was within two years from July 17, 1901 (R., p. 155).

The motion was denied, defendant excepted (R., p. 155).

Defendant declined to submit any evidence. Thereupon the jury was addressed by counsel for each party and was charged by the Judge (R., pp. 156–163), and the jury after deliberation rendered a verdict as stated above for plaintiff in the sum of $10,000 (R., p. 165).

Thereupon defendant moved to set aside the verdict on the ground that the same was excessive, contrary to the evidence and contrary to law, and on the grounds mentioned in Section 999 of the New York Code of Civil Procedure, and for a new trial. The motion was made on the Judge's minutes and the stenographer's minutes and was denied (R., p. 165). Thereafter assignments of error, numbered 1st to 35th, were filed May 17, 1907 (R., p. 166 to 180), and a writ of error duly taken to the Circuit Court of Appeals, 2d Circuit (R., p. 1).

The bill of exceptions was settled and filed August 29, 1907 (R., p. 166).

The latter Court affirmed the judgment (R., p. 186), filing a *Per Curiam* opinion (R., p. 184). Thereupon a writ of error was duly taken to this Court (R., p. 187). The assignments of error filed on that writ are at pages 188 to 202, and numbered I. to XXXV., and are identical with the said assignments of error filed on the writ of error to the Circuit Court of Appeals.

The objections to plaintiff's recovery based upon the alleged invalidity of the copyright, because plaintiff had no statutory right to take the copyright, and because of omission to inscribed notice upon the painting, are not presented, as those questions have heretofore been decided by this Court adversely to defendant's contention (see *Am. Tobacco Co. vs. Werekmeister*, 207 U. S., 284).

Among important questions to be now argued some touch the admission of evidence educed by plaintiff below to prove his case and especially the evidence educed from the books and officers of defendant below. The exceptions to this evidence and the errors assigned thereon are comprehended within the 1st to 28th (both inclusive) assignments of error and especially the rulings of the court requiring the defendant to produce its books and admitting evidence therefrom against defendant's objection, accompanied with intimations of the court's intention to punish the defendant as for contempt if it did not produce its books.

Another important question is whether an action for penalties can be maintained without *finding* the infringing sheets in defendant's possession.

Facts Touching the Production of Defendant's Books and the Obtaining of Evidence Therefrom and From the Defendant's Officers.

Charles Eddy was the secretary of the American Lithographic Company, the defendant, and had been since February, 1901, and was and had been a stockholder for ten years (R., p. 29).

A *subpœna duces tecum* was served on Mr. Eddy requiring him to appear and testify on October 30th, 1906, and to bring with him

" and produce at the time and place aforesaid, all business " books of said defendant, containing entries relating to " the manufacture and sale by it of certain posters " or chromos called 'Here's to Old English,' also " all correspondence with the American Tobacco " Company relating thereto, and all receipts executed by that " company for such posters, orders for delivery and all memo- " randa relating to such manufacture and sale between July 1, " 1901, and July 1, 1903, now in your custody, and all other " deeds, evidences and writings which you have in your " custody or power concerning the premises " (see subpœna, Exhibit F, Rec., p. 30).

The subpœna was *not* directed to the defendant, but only to Mr. Eddy as an individual (R., p. 30).

The subpœna had been served upon him the day before its return day (R., p. 30). Mr. Eddy attended court on the return day of the subpœna, viz., October 30th (Tuesday), but did not bring with him any of the books and papers specified in the subpœna because there were none such in his custody (R., p. 31), and the subpœna required him to produce only the books and papers " now in your custody " (R., p. 30).

The only record in his custody was the " Minutes of the board of directors," but he did not bring that book because the subpœna required only books " containing entries relating " to the manufacture and sale by it of certain posters or " chromos called 'Here's to Old English;' " and his Minute book contained no entries respecting that matter (R., p. 31).

Mr. Eddy himself had no personal knowledge of dealings with the American Tobacco Company (R., p. 31), and no recollection of seeing the pictures (R., p. 32). He had been purchasing agent from May, 1901 (R., p. 33), and had no connection with the manufacturing after 1898 down to February, 1906 (R., p. 33). He did not know what books were kept by the company (R., p. 35), excepting the books in his own department, which, at the time of testifying, was the manufacturing department of which he had had charge only since February, 1906 (R., p. 35).

Plaintiff's counsel then called upon defendant's counsel to produce " the letters and vouchers which relate to the trans-

actions between the two companies," this demand being under a notice to produce theretofore served. Defendant's counsel did not produce anything (R., p. 36). The distinction between the books in Mr. Eddy's custody, as head of department at the time of testifying, and the old books covering transactions in July, 1901, to July, 1903, is to be kept in mind (R., p. 37).

There was also a Minute book of the proceedings of the executive committee, but that book of minutes was in charge of the secretary of that committee, Mr. Donaldson, and Mr. Eddy, although a member of the committee, had no custody of the book excepting that he "acted as secretary *pro tem* sometimes when the secretary was away" (R., p. 38). It never appeared that there was any entry in the executive committee minute book which related to the controversy.

The testimony thus far had been simply inquiries as to the defendant's customs in business, not at the time of the alleged offending transactions, as to which the witness knew nothing, but as of the date of testifying when the following colloquy occurred (R., p. 42):

"MR. KNAUTH: The witness does not even produce the books here which he was supposed to bring.

"THE COURT: He says he has not got them. (To the witness.) You have the minute book.

"THE WITNESS: I have the minute book of the board of directors.

"THE COURT: You ought to have brought that."

(Note: He had brought it and had already testified that the minute book contained no record of any transaction relating to these pictures (R., p. 31).

"BY MR. KNAUTH:

"Q. Will you also produce the minute book of the executive committee?"

Defendant's counsel objected to the witness making any bargain on behalf of the defendant. Thereupon plaintiff's counsel made the following motion (R., p. 42):

"MR. KNAUTH: I make the motion now that the defendant be required to produce on Wednesday of this week, at the opening of this Court, the minute book and minute book of the executive committee, and its business books relating to any transactions as to the

manufacture and sale of the posters or chromos called 'Here's to Old English,' and also all correspondence with the American Tobacco Company relating thereto, and all receipts executed by that company for such posters, orders for delivery, and all memoranda relating to such manufacture and sale between July 1, 1901, and July 1, 1903. I make that motion."

The defendant objected, defendant's counsel saying (R., p. 42):

"MR. JENNER: I object on one ground, at any rate that due notice of that motion has not been given. If due notice of such a motion had been given I should have been better prepared to argue the motion and cite authorities. I suppose that section means something."

The reference being to Section 724, Revised Statutes, which requires "due notice" of such a motion. Thereupon the court ruled as follows (R., p. 42):

"THE COURT: The defendant company is here in court on the trial of the action which trial it has had due notice and of the nature of the action and of the question involved, and not only that, but one of its executive committee has had a subpœna served upon him some days ago to produce the books and papers of the company relating to this transaction in issue, and so the Court holds that notice of 24 hours is due and ample notice, and *the Court now orders that the defendant*, the American Lithographic Company, produce in this court, at this place, on Wednesday next, at 11 o'clock A. M., the book of minutes of the Board of Directors, the book of minutes of the Executive Committee, the books of that company and the books in its possession showing all orders received by it or any of its predecessors, orders received for lithographic work of any and all descriptions, and sales made by it, and entries of orders filled, the nature and character of such work, the charges made for such work, and the payments received for such work clear back to the year 1901, and all correspondence and letters received, letters sent, copies of same, especially relating to such work between it and the American Tobacco Company, and especially with reference to anything that has any bearing on or relationship to this picture, Exhibit G, for identification."

Defendants' counsel again called attention to Section 724, especially the latter words of the first sentence which pre-

scribe the cases in which production can be ordered (R., p. 43):

After brief argument by defendant's counsel, the court added (R., p. 43):

"This company knows perfectly well what is wanted of it, and this company knows perfectly well, if it has had anything to do with this transaction, it has the books and papers and letters, contracts and correspondence, and if it has not had anything to do with it, it don't have any such books, papers or correspondence, and won't produce them, and will say so; if it has it is its duty to do so, and *this act* says on due notice."

And concluded the explanation of the Court's position by the following (R., p. 43):

"I cannot direct this witness to bring books and papers that he don't have in his custody or under his control. *The company can be directed to produce them.*"

Thus far the Court seemed to be proceeding under § 724, although not in conformity with it.

It will be observed that the order just quoted above held, in substance, that *no notice* of a motion for production was necessary, and that 24 hours' time for the production *after the order* was ample, and *the order to produce was directed against the defendant and not against the witness.*

Argument between court and counsel ensued touching defendant's rights under § 724 (see R., p. 45), the court appearing to be of opinion that § 724 applied.

After such argument which, on the part of the defendant, related to the exemption of a party from producing books in a case where equity would not require production and to the question of the power of the court to make an order for the production of the books except on a motion and due notice thereof (here the motion had been made without any notice at all), the court remarked as follows (R., p. 46):

"THE COURT: In its full length and in its full breadth. There is no question of due notice. What is due notice depends altogether upon time, place and circumstances. The plaintiff here has subpœnaed the secretary af the company. Ordinarily they are supposed to have the custody of the books and papers so that they can produce them. The secretary says he don't have them, has nothing but the records

and meetings of the Board of Directors. All the other books and papers, he says, are not under his control, and he don't have the slightest idea who these men are. He is secretary of the company and he does not seem to know who anybody is, nor where they are, nor who has got the books, nor who has got the papers, nor where they keep them; and, of course, we are bound to accept his testimony; he is called here by the plaintiff. Now, he can produce the book that he does have custody of; that is all he has control of. That is all the power of the Court can do in that regard."

Apparently this statement of the court limited the requirement of production by Mr. Eddy, the witness, to the directors' minute book (which he had already brought and testified that it contained nothing relating to the subject), but thereupon the plaintiff's counsel moved that the order to produce be limited to books and papers relating to transactions between July 1, 1901, and July 1, 1903, the prior order, if it was an order, being unlimited in respect of the period (R., pp. 46–47). The court directed the limitation accordingly, and then added (R., p. 47):

"THE COURT: Stand aside, witness. Be here next Wednesday with the books of minutes which you have charge of, and if there is not anything there that anybody wants, that will end that."

The trial then proceeded with other witnesses, and Mr. Eddy on the day specified attended and resumed the stand. Thereupon the court said (R., p. 57):

"THE COURT: The Court is ready to hold under that subpœna it was the duty of this witness, whether as secretary of this company, as an officer of this company, and as a member of its executive committee, whether he has the immediate custody of them or not, to produce every book and paper of the description called for relating to these chromos, these pictures, and you can examine him about it again."

This was basing the court's action upon the *subpœna duces tecum*, which hitherto had been practically ignored.

Defendant's counsel then called the Court's attention to the order previously made directing Mr. Eddy to bring the minute-book, and that that order was the only order made, to which the court replied that it had just given notice that it

was going to make another order. No such notice had been given although the court had stated its readiness to hold as quoted above (Rec., pp. 57–58). The court's recurrence to the *subpœna duces tecum* was a surprise to defendant's counsel.

Objection to the proposed order was made by defendant's counsel as follows (R., p. 58):

"MR. JENNER: I object to your Honor making any such order, on the ground that your Honor is without authority in the premises; that no notice of any such motion has been made; that as a matter of fact *no motion has been made;* that the order is of your Honor's voluntary will, *without being inspired by the plaintiff*, and that the order is untenable."

It may be here stated, with propriety as we think, that thus far in the trial, the plaintiff's witnesses had been examined by the court itself, instead of by plaintiff's counsel, to an extent somewhat unusual in our experience, a practice which tended to embarrass the defendant's rights.

The Court misconstrued and took offence at the words italicized above, the plain meaning and intent of which were that the court should not make the order *ex suo sponte*, but only on motion of the plaintiff. The offending words were, however, withdrawn by counsel (R., p. 58), although counsel believed then as now that the words were perfectly respectful, both in form and intent.

The court then stated (R., p. 58):

"I am now ready to hold and do hold that under that subpœna it is the duty of the witness to produce those books and those papers, and so the Court will make an order."

It then transpired that the witness, Mr. Eddy, had brought with him the minute book of the board of directors (R., p. 60) and that the book contained entries from December 30, 1895, to January 23, 1902 (R., pp. 60–61). The *plaintiff* then offered the book in evidence to which defendant objected on the ground that the book was the property of the defendant and could not then be put in evidence without its consent (R., p. 61). The *plaintiff* then asked that the book be marked for identification, to which defendant also objected on the same grounds (R., p. 61). The court then directed the witness to give the book to the court, to which defendant objected. The court then instructed the witness to do it,

and defendant's counsel directed the witness not to hand the book to the court (R., p. 61). But counsel immediately stated (R., p., 62):

"If the object is simply for the Court to mark the book for identification so it can be identified hereafter, I have no objection to that. I object to the Court's examining the book."

The court declined to accept the modification, instructed the witness to pass the book to the court, the counsel repeated his instructions to the witness, the witness declined to pass the book, the court declared the witness guilty of open contempt of court, directed the preparation of an order committing the witness to jail until compliance, and directed the marshal to be ready to execute its order forthwith, then took a recess to enable this to be done (R., p. 62).

It had already appeared that the Minute Book contained no entry respecting these prints (R., p. 31). The court had, as already said, aided the plaintiff by interrogating the plaintiff's witnesses to an extent unusual in our experience, and counsel feared, it being the customary duty of the stenographer to mark exhibits, that it was the purpose of the court to hand the book to plaintiff's counsel to be examined by him. Counsel also believed that the court's demand was not within its just prerogative as matter of strict right. Counsel disclaimed then and disclaims now any intention of being disrespectful to judicial authority and now urges in extenuation of any omission of duty or excess of caution, which might have been imputed to him, that the situation had become trying to the patience of counsel and one in which it became difficult to keep the equanimity required by the circumstances.

While the commitment papers were being made out, the order which had been made on the prior Monday by the court directing the defendant to produce books and papers came up, and the court inquired whether the defendant was ready to comply with that order.

The defendant declined to produce the books and papers and based the declination (R., p. 63)

"upon the ground that the Court is without authority to require the production, that the time allowed was insufficient, that the description of the books and papers were too comprehensive, that the order was improvident in that respect, and that the witness is privileged under Section 724."

Plaintiff then proceeded with its proofs calling other witnesses.

In the meantime Mr. Eddy and defendant's counsel had reconsidered their attitude and Mr. Eddy announced his willingness to produce the minute book and hand it to the court (R., p. 77). The clerk was directed to enter an order that Mr. Eddy was discharged from custody "with *a warning not to get caught in any way again*" and the clerk was directed to keep the book in his custody (R., p. 85). The book was marked by the Court for identification, but that it was ever opened does not appear.

Later Mr. Eddy, the witness, resumed the stand and was asked whether he had brought with him any business books of the Lithographic Company containing records and transactions between it and the Tobacco Company in 1902, and he said that he had not (R., pp. 129, 130). The court then examined the subpœna *duces tecum* which had been served on the witness (fol. 603) and referred the witness to its requirements to produce (R., p. 130).

"all business books of said defendant, containing entries relating to the manufacture and sale by it of certain posters or chromos called 'Here's to Old English.' Now, do you know what picture that relates to—what picture it means? A. Only what I have heard here in court, sir."

The court then examined the witness as to the examination that the latter had made of the books for entries therein relating to the Tobacco Company's transactions and his efforts to find other papers referred to in the subpœna (R., pp. 131–132).

The plaintiff then moved the court to direct the witness to make a further search for the books and papers specified in the subpœna, and stated that the treasurer of defendant company had been served with a subpœna *duces tecum*, but had excused himself because of a surgical operation which had been performed upon him the prior Saturday (R., p. 133).

The defendant objected on the ground that the books were privileged under Section 724 and also objected to the court instructing the witness to obtain authority to obtain the books on the ground that it was not the duty of an officer of a corporation to seek authority to bring down books (R., p.

133). The treasurer, Mr. Ettlinger, had attended the previous week pursuant to the subpœna (R., p. 134), but a surgical operation having been performed upon him Sunday morning, he had been unable to come down afterwards and had sent a physician's or surgeon's certificate (R., p. 134). Thereupon the court said, referring to the treasurer, Mr. Ettlinger (R., p. 134) :

" THE COURT : He is not here to-day. It is easy enough for him if he has any purpose to comply with the subpœna of the Court ; it would be easy enough for him to send down the books by Mr. Eddy or by some other official, and we will make a trial and see if he gets around to-morrow. If not, we will see if there is any way to get at him. I think there is. Possibly they are more powerful than the Court, but we will make a *desperate effort* to see if the authority of the Court can be defied or not. It will be time enough and this Court will be perfectly willing to wait from day to day for all necessary legal proceedings."

And addressing the witness by way of admonition said (R., p. 134) :

" TO MR. EDDY (the witness) : *You had better try to get those books here.* Of course ; take your own course."

Plaintiff's counsel then called upon defendant to produce correspondence between it and the Tobacco Company, to which call defendant's counsel responded that he had no such papers in his possession or under his control or in his custody (R., p. 135).

Obviously the only courses open to Mr. Eddy were jail, or production of the books. If his domestic condition precluded the first, only the last remained, viz. : to yield under duress of fear of imprisonment. Whether that duress was rightfully exercised is one of the questions presented.

The following day Mr. Eddy, defendant's secretary, resumed the stand, and, questioned by the court, said that he had with him the books and papers called for in the subpœna so far as he could find them (R., p. 144), and the court addressing *plaintiff's counsel* said (R., p. 144) :

" THE COURT : Now, *if you want them, get them*, because there is no question now."

Plaintiff's counsel then asked for the defendant's books for the years 1901 and 1902. Defendant then objected to the production of the books (R., p. 144), stating the objections as follows:

"I object to the opening of them; I object to their being put in evidence or to any part of them being put in evidence, on the ground that the same is a compulsory production by the defendant at the instance of the plaintiff, under your Honor's order, of books and papers in a *qui tam* action or an action for penalties, and that the obtaining of evidence in that way from the defendant is a violation of the defendant's rights under Section 724 of the Revised Statutes, and under the Fourth and Fifth Amendments and the Fourteenth Amendment to the Constitution of the United States."

The court overruled the objection and the defendant excepted (R., p. 145), and it was agreed between the court and respective counsel that the objection should be deemed taken to each question.

The court stated its position, but in words which counsel was unable to clearly apprehend (R., p. 145, top of page), but the upshot was that the books were deemed to be present under the subpoena *duces tecum* but mainly under the order of the court made the prior evening, the court saying (R., p. 145):

"Mr. Eddy is here and they are here. You (defendant) can have all the objections."

And

"that the witness does not produce this book or any of these books voluntarily; he produces it *because he is directed by the Court to do it, and he does it under protest and the defendant protests and objects.*"

And adding:

"THE COURT: That will be the claim under all the objections. There is no repeating them over and over. The Court overrules the objection and gives you an exception and directs him to produce the book and gives you an exception to that. Now, what next? That will go right along to every question. Of course, do not stop to write it out—same objection, same ruling, same protest, and an exception; the same ruling, the same objection, the same protest, the same direction, and an exception."

And the court directed (R., p. 145) that the same procedure would apply without further expression to any other witness on the same subject.

Mr. Eddy then read from the defendant's books, records and entries of alleged deliveries of show cards and hangers to or for the American Tobacco Co., which constituted the evidence of plaintiff's case upon which he relied (R., pp. 146 to 154). And these entries were referred to by the Court in the charge as practically establishing plaintiff's case (R., pp. 158, 159).

Other facts material to defendant's assignments of error will be referred to later.

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Specification of Errors Relied Upon.

(1) The compulsory production of defendant's books and the reading in evidence of entries therefrom, whether under sec. 724 R. S. or *subpœna duces tecum* was error (See First to Fourth Points).

(2) Refusal to direct a verdict for defendant because no infringing sheets were found in possession was error (See Fifth Point).

(3) Admitting in evidence the Judgment Roll in an action in Replevin brought by same plaintiff against American Tobacco Co. was error (See Sixth Point).

(4) Admitting the hearsay evidence of Mr. Hill was error (See Seventh Point).

(5) Refusal to direct a verdict for defendant because of no evidence to show infringement within two years before bringing action was error (See Eighth Point).

Lees vs. United States, 150 U. S., 476.
Boyd vs. United States, 116 U. S., 616.

SECOND POINT.

Discovery, i. e., production of books and papers will not be ordered in chancery in aid of an action to enforce penalties and forfeitures.

Defendant argued below and does now (see Third Point) that sections 720 and 860, R. S., protected it from compulsory production of its books.

Section 724, *above cited*, authorizes production of books and papers *by parties* only "in cases and under circumstances "where they might be compelled to produce the same by the "ordinary rules of proceeding in chancery."

It was said by Chancellor KENT, in *Livingston vs. Tompkins*, 4 Johnson's Ch. Rep., 431:

"It may be laid down as a fundamental doctrine of the "court, that equity does not *assist* the recovery of a penalty "or forfeiture, or *anything in the nature of a forfeiture*" (italics *sic.*).

See *2 Story's Equity Jur.*, Sec. 1319.
2 Daniel's Chancery Pl. & Pr., 1557.
2 Beach, Mod. Eq. Jur., Sec., 871.

And this includes the disclosure of any fact which might form a step in the prosecution. The author cites, in a note, numerous cases in support of the proposition of the text.

Perhaps the fullest statement of the rule may be found in 2 Story Eq. Jur., sec. 1494.

See, also, *Horsburg vs. Baker*, 1 Peters, 232.

And, in *Boyd vs. U. S.*, 116 U. S., 616-631, this court, referring to section 724, and after commending the wisdom of Congress in restricting the proceeding to "cases and under circumstances" where the parties might be compelled to produce books and writings by the ordinary rules of procedure in chancery, said:

"The court of chancery had for generations been weighing and balancing the rules to be observed in granting discovery on bills filed for that purpose in the endeavor to fix upon such as would best secure the ends of justice. To go beyond the point to which that court had gone may well have been

thought hazardous. Now it is elementary knowledge that one cardinal rule of the court of chancery is never to decree a discovery which might tend to convict the party of a crime, or to forfeit his property."

See, also, *U. S. vs. Saline Bank of Virginia*, 1 Peters, 100. *Counselman vs. Hitchcock*, 142 U. S., 563.

The exemption has always been allowed in actions for penalties under the copyright and patent laws.

Atwill vs Ferrett, 2 Blatchf., 39, was a demurrer to a bill in equity which sought discovery in aid of an action at law for copyright infringement. The bill sought *inter al.* discovery of the number of pieces printed and of the number on hand. The bill was held to be bad, the Court saying that

" The defendants cannot be directly required to convict " themselves of the act which carries with it the forfeiture."

Johnson vs. Donaldson, 18 Blatchf., 287, was an action under Section 4965 to recover penalties, &c., for violating a copyright, Judge WALLACE held that the defendant cannot be compelled under a *subpœna duces tecum* to produce books of account and papers to be used in evidence for the plaintiff, and said, on the authority of *1 Daniel's Chancery Pr.* (4th Am. Ed.), 563, and *Story's Equity Pleadings* (Section 575), that :

" Courts of equity when sifting the conscience of a de- " fendant by a discovery never require him to disclose facts " which would subject him to a penalty."

So, in *Snow vs. Mast*, 63 Fed. Rep., 623, it was held that an alleged infringer of a copyright cannot be required, by answer or otherwise, to disclose any fact upon which a claim against him for penalties and forfeitures accruing under section 4965 may depend. The case just cited was a bill in equity, and the bill was dismissed on demurrer.

Snow vs. Mast came later before the Court in 65 Fed. Rep., 996, where the former decree dismissing the bill on the demurrer was set aside and the demurrer was overruled, but the grounds of this decision do not appear in the opinion and it

does appear that the bill was ordered amended as prayed for in the petition for rehearing. From which we infer that there had probably been a waiver by the complainant of the penalties and the authority of the first decision is unimpaired.

See also *Daly vs. Brady*, 69 Fed. Rep., 285.

Section 724 has been applied to exempt from production in penalty cases against corporations.

U. S. vs. National Lead Co., 75 Fed. Rep., 94, held that equity would deny a production of books and papers where such production would subject a party to a penalty or forfeiture and the federal courts will do the same under section 724.

In *Newgold vs. American Electric Novelty Co.*, 108 Fed. Rep., 341 (S. D., of N. Y.). it was held in an action to recover penalties under section 4901 for falsely marking an article as patented, that the defendant cannot be compelled, under section 724, to produce books or papers containing evidence against itself, either for use in evidence or for the inspection of the plaintiff before the trial, because such an action is penal in character.

Oro Water, Light and Power Co. vs. City of Oroville, 162 Fed. Rep., 975.

THIRD POINT.

The compulsory production of defendant's books and the obtaining of evidence therefrom in support of plaintiff's case was error.

The question under this point is not whether a corporation may have the privileges of the 4th and 5th Amendments, but whether it is protected by *statutes* enacted for the benefit of *parties*.

The alleged error is covered by assignments of error numbered 9th to 22d, both inclusive (R., p. 169 to 178, and 191 to 199).

There was error whether the evidence was obtained under

the *subpœna duces tecum* or under the order of the presiding judge, and whether the subpœna or order was directed to the witness Charles Eddy, the secretary of defendant company, or to the defendant itself.

The defendant objected to the production of the books, to the opening of them, to any part of them being put in evidence, on the grounds that the same was a compulsory production of books and papers at the plaintiff's instance, under the Court's order, in an action for penalties and that the obtaining of evidence in that way was a violation of defendant's rights under section 724 and under the 4th, 5th and 14th Amendments (R., p. 144).

The objection was overruled and the defendant excepted, and over the protest of defendant, the production was directed by the Court.

It was also directed by the Court and assented to by plaintiff's counsel that the same objection, ruling and exception should be deemed made and taken to every question eliciting information from the books (See Rec., pp. 144 and 145).

Section 860 R. S. was not specifically cited to the Court on the occasion of the rulings on the particular questions embodied in the assignments of error now considered, but the examination of the witness, Mr. Eddy, involving these alleged errors was a continuation of the examination of the same witness, at the beginning of which defendant had objected on the grounds of § 860 as well as § 724 and the Amendments, and it had then been agreed that the same objection should be deemed taken to each question and followed by the same ruling and exception (R., pp. 29 and 31).

Defendant's counsel claimed " that the defendant is privileged from giving testimony either *by books* or officers, under Revised Statutes, sections 724 and 860, the 4th and 5th Amendments to the Constitution and the 14th Amendment " (Rec., p. 29), and

" THE COURT: So as not to encumber the record, you may " regard every question is under the same objection, ruling " and exception " (Rec., p. 31).

Plaintiff in error contends that its rights under U. S. Rev. Stat., sections 724 and 860 were violated by the compulsory production of its

books and the compulsory reading in evidence by Mr. Eddy, its treasurer, entries therefrom.

The production of the books was compelled by both a *subpœna duces tecum* and by a *direct order* of the presiding judge during the trial, with intimations of commitment for contempt in case of non-compliance.

The record is not quite clear whether the Court based the power to compel production upon the *subpœna*, or upon an inherent power to order, but it is perhaps correct to say that at the end the authority to compel production was based upon the *subpœna* supplemented by an order (Rec., pp. 29–42, 43, 44, 45, 46–57, 58, 59–133, 134–144, 145, and see *ante*, p. 13).

Thus, the plaintiff exhibited a *subpœna duces tecum* served on Mr. Eddy (R., p. 30), but nothing was done upon that. Next, plaintiff moved that defendant produce its books of account, &c., upon which motion the court ordered the defendant to produce the books (R., p. 42). Then the court based the order to produce upon the *subpœna duces tecum* (R., p. 58) and when the books were brought into court, the command to open them and read contents was based on the *subpœna* and also the order (R., pp. 144–145).

We contend

(1) The *subpœna duces tecum* was not rightfully available to the plaintiff to obtain production of books in a penalty action.

(2) That Sec. 724 governs the production of books in an action at law.

(3) That under Sec. 724 defendant could not rightfully be compelled to produce its books.

Authority to Issue the Subpœna Duces Tecum.

The Federal Courts have derived their authority to issue *subpœna duces tecum* (except in aid of a *dedimus* specially provided for by § 869) from Sec. 716, which re-enacted Sec. 14 of the Judiciary Act of 1789, which gave power to those Courts to issue all writs which might be necessary to the exercise of their jurisdiction and were "agreeable to the usages and principles of law." [1]

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[1] *In re Shepherd, 3 Fed. Rep. 12.*

The writ of *subpœna duces tecum* was such a writ, but that writ was not available against *a party* in 1789, because as against a party it was not agreeable to the usages and principles of law.

In 1864, by Ch. 210, sec. 3 (13 St. L. 351) re-enacted as part of R. S. sec. 858, the incompetency of a person to testify because of interest or being a *party* was removed.

Up to that time, plainly, a *subpœna duces tecum* could not issue against a *party*, but production of books and papers on the trial in actions at law was obtainable solely by Section 15 of the Judiciary Act of 1789, re-enacted as R. S. 724, and *in equity* by a bill of discovery. After 1864 a *subpœna duces tecum* could, agreeably to the usages and principles of law, issue *in equity* against a party, and a party had an option between that writ and proceeding by bill of discovery. In common law actions also the bill of discovery could continue to be used to obtain discovery of books *before* the trial. The Act of 1864 permitted a *party* to testify, and subjected him to the *subpœna ad test.*, but did not inferentially authorize production of books on the trial in common law actions, because that matter had been already provided for by statute, Section 15 of Judiciary Act of 1789.

We believe the foregoing to be a correct brief statement of the evolution of the law on the subject of production of books, and its propositions we desire to amplify.

Sections 724 and 860 are as follows:

" Sec. 724. In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the *parties* to produce books or writings in their possession or power, which contain evidence pertinent to the issue, *in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery.* If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases on nonsuit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default."

" Sec. 860. No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceedings, *or for the enforcement of any penalty or forfeit-*

ure: Provided, That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."

Section 724 applies only to the trial of *actions at law*, and mentions *parties*, not persons. It authorizes production only "in cases and under circumstances where they (the parties), might be compelled to produce the same by the ordinary rules of proceeding in chancery." (See Second Point above.)

It also prescribes the penalty upon the party for non-compliance.

Section 860 also refers to *parties*, not *persons*, and forbids discovery "by means of a judicial proceeding" in any criminal proceeding, or proceeding "for the enforcement of *any penalty* or forfeiture."

Section 724 controls the production of book evidence from the adversary party at the trial and excludes all other modes of compelling production.

In *Ex parte Fisk*, 113 U. S., 713 (1884), in a case where a party sought to examine the adversary party (a natural person) before the trial, in conformity with the Code of Procedure of New York, this Court held that such examination could not be had. That holding was upon the ground that the principle that in actions at law the laws of the States shall be regarded as rules of decision in the Federal courts, under Section 721 United States Revised Statutes, and that the practice, pleadings, and forms and modes of proceedings in such cases shall conform as near as may be to the State law, under Section 914 United States Revised Statutes, is applicable only where there is no rule on the same subject prescribed by act of Congress; and that Sections 861, 863, 866, 867, 868, 869 and 870 (U. S. Rev. Stat.) prescribe the mode of proof in common law actions in the Federal Courts, the circumstances under which depositions may be taken *before* trial, the manner of taking them, and the use of the *subpœna duces tecum* in aid of the *dedimus*.

And Mr. Justice MILLER said, specifically referring to Sec-

tion 861, which prescribes the mode of proof in the trial of actions at law (p. 724):

"Every action at law in a court of the United States must be governed by the rule, or by the exceptions which the statute provides."

As the order for examination in the Fisk case did not come within any of the exceptions, the order for examination was held to have been illegal.

If sections 861, 863, 866, 867, 868, 869 and 870 provide a system for taking depositions before the trial, as this Court said they did, and, therefore, exclude the operation of State statutes, and control the subject matter in the Federal courts, then, for similar reasons and by the same argument, section 724 controls the production of books and papers *at* the trial of actions at law in the Federal courts.

The proposition of Mr. Justice MILLER that "every action at law in a court of the United States *must be governed by the rule, or by the exceptions, which the statute provides*" is firmly founded in obvious and sound reason, and seems to state a proposition generally applicable in the interpretation of statutes.

"The removal statute is plain, and leaves no room for the court to make an exception when Congress has made none."

Haas vs. Henkel, 216 U. S. 462, 474.

Paraphrasing the language of Mr. Justice MILLER in the Fisk case (p. 722), "No one can examine *this provision for* "*obtaining production of books and papers* to be used in the "courts of the United States and have any reasonable doubt "that, so far as *it* applies, *it was* intended to provide a system "to govern the practice, in that respect, in those courts. *It* "*is*, in the first place, too complete, too far-reaching, and too "minute to admit of any other conclusion." "Its purpose is "clear to provide a mode of proof in trials at law, to the ex-"clusion of all other modes of proof." (The words *italicized* are interpolated.)

In *Union Pacific R. R. Co. vs. Botsford*, 141 U. S., 250 (1891), the defendant sought to compel the plaintiff to submit

to a surgical examination in advance of the trial. This Court, referring to section 724 said (p. 256) :

" *The only power of discovery or inspection,* conferred by Congress, is to ' require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery,' and to nonsuit or default a party failing to comply with such an order. Rev. Stat., § 724."

In *Hanks Dental Assn. vs. Tooth Crown Co.*, 194 U. S., 303 (decided 1904), the action was at law for infringement of a patent. The sole evidence of infringement had been the evidence of the president of defendant found in his deposition taken before the trial at the instance of the plaintiff, pursuant to an order of the Circuit Court under section 870 of the New York Code of Procedure, the plaintiff contending that the examination of a party before trial, if permitted by the law of the State, was authorized by the act of Congress of March 9, 1892, 27 Stat. L., page 7. The matter came to this Court upon a certified question which asked instruction whether the order directing the deposition to be taken as stated above was valid and authorized under the act of March 9, 1892.

This Court replied that the act of March 9, 1892, 27 Stat., 7, in regard to taking testimony, does not repeal or modify § 861 Rev. Stat. or create any additional exceptions to those specified in the subsequent sections by enlarging the right of taking depositions, and is not supplementary to § 914, and hence that the order for the examination of the president of the Hanks Dental Association before trial was *not* authorized.

In so holding, this Court quoted (p. 307) from the opinion in *Union Pacific R. Co. vs. Botsford*, 141 U. S., 250, the words which we have quoted above from that opinion, that,

" The only power of discovery or inspection, conferred by " Congress, is to ' require the parties to produce books or " ' writings " as provided by § 724 (Rev. Stat.).

If under the rule of the *Fisk* case, the Federal Statute within its scope is exclusive of state statutes, it must also be exclusive of unstatutory procedure, else State unstatutory procedure might prevail over Federal statutory procedure.

The history of Section 724 shows that its object was to provide in actions at law a method of obtaining inspection of books and papers analogous to discovery in equity.

Section 724 R. S. was a re-enactment of Sec. 15 of the Judiciary Act of 1789, and the object of Sec. 15 was to apply to actions at law the remedy which in equity was afforded by a bill of discovery.

Owyhee Land & Orr Co. vs. Tautphaus, 109 Fed. R., 547 (*C. C. A. 9th Circ.*).
Hylton's Lessee vs. Brown, 1 Wash. C. C., 298.
Finch vs. Rikeman, 2 Blatch., 302.

That anciently the production of the books of a party could not be compelled at the trial of an action at law appears from the following remarks of Sir Wm. Blackstone contained in the third volume of his Commentaries, which first appeared in 1767. That expounder of the principles of the common law, speaking of the defects in trials of actions at law, mentioned, firstly, the want of a complete discovery, saying (3 Black. Com., 382):

"it seems the height of judicial absurdity, that in the same cause between the same parties, in the examination of the same facts, a discovery by the oath of the parties should be permitted on one side of Westminister Hall, and denied on the other: or that the judges of one and the same court should be bound by law to reject such a species of evidence, if attempted on a trial at bar, but, when sitting the next day as a court of equity, should be obliged to hear such examination read, and to found their decrees upon it. In short, within the same country, governed by the same laws, such a mode of inquiry should be universally admitted, or else universally rejected."

The second defect mentioned by him was stated as follows:

"A second defect is of a nature somewhat similar to the first: the want of a *compulsive power* for the production of books and papers belonging to *the parties*. In the hands of *third persons* they can generally be obtained by rule of court, or by adding a clause of requisition to the writ of *subpœna*, which is then called a *subpœna duces tecum*. * * * And, as this evidence may be finally obtained, and produced on a trial at law, by the circuitous course of *filing a bill in equity*, the *want of an original power* for the same purposes in the

courts of law is liable to the same observations as were made on the preceding article."

The foregoing shows that in Blackstone's time the *subpœna duces tecum* was not available in actions at law for bringing into court the books of a *party*, and hence was not a writ " agreeable to the usages and principles of law," under Sec. 14 of the Judiciary Act of 1789 (R. S., § 716).

In *Merchants Nat. Bank vs. State Nat. Bank*, 3 Cliff., 201 (1868), Judge CLIFFORD, then an Associate Justice of this Court, held that at common law parties could not be compelled to attend or by *subpœna duces tecum* to produce books.

See, also,

U. S. vs. Reyburn, 6 Pet., 363.
President, &c., vs. Hillard, 5 Cowen, 419.

It can hardly be doubted that section 15 of the Judiciary Act of 1789 was motived by the substance of Blackstone's comments upon the difference between law and equity in respect of the production of the books of the parties, and, as already said, Sec. 724, R. S., was a re-enactment of Sec. 15 of the Act of 1789.

If it had been supposed in 1789 that the production of the books of the parties at the trial could be compelled by a *subpœna duces tecum* there would have been no reason for either Blackstone's comments or for Sec. 15 of the Judiciary Act of 1789, and it is strange that in the century elapsed since 1789, prior to the case at bar, no reported successful attempt has been made to compel production at the trial of an action at law of a party's books by *subpœna duces tecum*. Resort has uniformly been had to the provisions of Sec. 724.

In suits *in equity* resort has sometimes been had to *subpœnas duces tecum* to obtain from the adverse party production of books, as in

Bischoffsheim vs. Brown, 29 Fed. Rep., 341.
Johnson Steel S. R. Co. vs. North Branch S. Co., 48 Fed. Rep., 191, 195.
Edison Elec. L. Co. vs. U. S. Elec. L. Co., 44 Fed., 294.*
Same vs. Same, 45 Fed. Rep., 55.*

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*These two Edison cases are not expressly stated to have been in equity, but the opinion in the later case shows them to have been so.

But in *Gregory vs. Chicago, M. & St. P. R. Co.*, 10 Fed. Rep., 529 (1882), and in *Kirkpatrick vs. Pope Mfg. Co.*, 61 Fed. Rep., 46 (1894), it was distinctly held that in *actions at law*, proceedings for obtaining inspection of documents at the trial are regulated by Sec. 724, and that the *subpœna duces tecum* was not available.

In the latter case, the Court considered the question at some length, and distinguished between suits in equity and actions at law in this respect, and founded the ruling on

Bischoffsheim vs. Brown, 29 Fed. Rep., 341.
Jacques vs. Collins, 2 Blatch., 23.
Coit vs. Amalgamating Co., 9 Fed. Rep., 577.
Gregory vs. Railroad Co., 10 Fed. Rep., 529.
Lowenstein vs. Carey, 12 Fed. Rep., 811.
Colgate vs. Compagnie Francaise, 23 Fed. Rep., 83.
Guyot vs. Hilton, 32 Fed. Rep., 744.

And the Court said:

" that the process of *subpœna duces tecum* is a convenient, efficient and proper method for bringing the paper into court is beyond dispute in this circuit. And its sufficiency has been shown and its further use approved in the following cases (*citations*). But an examination of the foregoing cases shows that they are all suits in equity. *In actions at law proceedings for obtaining inspection of documents on the trial are regulated by § 724.*"

The writ of *subpœna duces tecum*, if it became available in equity after parties became competent as witnesses, became so because the statutes did not attempt to regulate discovery of books in equity.

The Revised Statutes contain no provision permitting a party seeking production of adversary books in an action at law to apply to the court for a *subpœna duces tecum*, and no provision regulating its issue. Hence, if such *subpœna* may lawfully issue, it is at the option of the pursuing party; the books and papers called for are in the pursuing party's discretion. All questions as to the identity of the books, the scope of the disclosure, the rights of the pursuing party, and the rights of the party pursued, if there are any, can be considered by the court only on the trial and under circumstances permitting only slight deliberation.

Section 724 requires a prior motion, upon reasonable no-

tice, and an order made thereon, thereby affording opportunity for presenting reasons for and against the production, and for deliberation by the court.

That this prior application is a substantial right of the party pursued, see

Thompson vs. Selden, 20 How., 194 (1857).
Bank of U. S. vs. Kurtz, 2 Cr. C. C., 342.
Owyhee, &c., vs. Tautphaus, 109 Fed. Rep., 547 (C. C. A., 9th Cir.).

If that is sound policy and the policy of the law, it is not served by an unregulated *subpœna duces tecum*.

The right of privacy in respect of books and papers has always been regarded by courts with solicitude. That right was secured against unwarrantable encroachments by the old Bills of Rights, and is secured, at least to natural persons, by the Fourth Amendment. It was and is secured in equity by requiring a bill or cross-bill for discovery, and the proceedings thereon permitting full consideration of the propriety of the discovery sought. Section 724 R. S. purports to regulate in actions at law invasions of the right of privacy as they were regulated in equity.

In *Oro Water, Light & Power Co. vs. City of Oroville*, 162 Fed. Rep., 975, the court, in holding that section 724 did not apply to suits in equity, but only to actions at law, remarked that

" a court of equity should make no order blindly. It should command no man anything which he has a legal right to refuse, and, when issued, its order should be specific and certain, leaving as little as possible to the discretion of the person or persons against whom it is directed. * * * *Obviously, then, there ought to be a hearing in advance of the order at which each party shall be given adequate opportunity to state and establish his contentions.*"

The remark is as applicable to a court of law as to a court of equity.

Courts have always exercised the power of assisting parties in obtaining a compulsory production of books from the adverse party, and also from third person witnesses only under well established restrictions. The practice in equity, under bills of discovery, was carefully guarded in order to prevent injustice, oppression and impropriety, and the frame-

work of Sec. 15 of the Judiciary Act of 1789 was carefully adapted to the same ends.

If it be proper that the books and papers of a party should be regarded as private and sacred, and proper that such privacy should yield under some circumstances to the just rights of the adverse party, and if it be wise, on the whole, that parties should be protected from self-incrimination in criminal and penal cases, the provisions of section 724 is adapted to secure all those ends, and does not go beyond that.

In an action at law *subpœna duces tecum* is not better, nor so well, adapted to secure those ends. The writ cannot be more effectual than the court's order. Under the order judgment absolute goes against the recalcitrant party for the amount demanded (a party cannot ask for more than his demand), while under the writ of *subpœna* punishment for contempt may follow, but the pursuer of the writ may lose his case.

Section 724 has not been modified expressly nor by implication.

In 1864 the incompetency of parties and interested persons as witnesses was removed. Act of July 2, 1864, ch. 210, sec. 3, vol. 13, p. 351. That section 3 was re-enacted as Sec. 858, R. S., and provides that "no witness shall be excluded "in any action on account of color, or in any civil action be-"cause he is a party to or interested in the issue tried."

That § 3 and § 858, R. S., refers only to *natural persons*, while § 724 includes *artificial* as well as natural persons, is manifest.

Its effect was to place parties upon the same footing as other persons in respect of their competency. We do not question that thenceforward a party could, in an action at law, compel the attendance of an adverse party by *subpœna*, nor that third persons were always subject to the *subpœna duces tecum*. But we do deny that the act of 1864 had the effect of abrogating section 15 of the Judiciary Act of 1789, and subjected a *party*, in an action at law, to a *subpœna duces tecum* for a compulsory disclosure of the party's books.

It is enough that Sec. 724 was re-enacted after the act of 1864 and at the same time as Sec. 858.

The right of a party to a *subpœna duces tecum* to compel the production of an adverse party's books, in an action at law, must be grounded upon the assertion that Sec. 3 of the Act of 1864 (R. S., 858), admitting parties as witnesses provided a remedy cumulative to that of Section 15 of the Judiciary Act of 1789, and hence that sections 724 (§ 15 of 1789) and 858 (§ 3 of 1864) are *in pari materia* and are to be construed together in that sense.

We submit that sections 724 and 858 intend the same thing now as the corresponding original sections (§ 15 of 1789 and § 3 of 1864) intended before the revision, because there is nothing in the revision which indicates an intent to alter the meaning of the original statutes or change their application.

If that is so, the two sections are not *in pari materia*, because they relate to different subjects. Section 15 of 1789 (R. S. 724) related to the production of books in actions at law; section 3 of 1864 (R. S. 858) related to admitting *persons* as witnesses. They had not a common purpose. They are consistent with each other, in that under the one a natural person being a party or interested may be a witness, and, nevertheless, production of his books may be compelled only in accordance with the other.

In *Faw vs. Marsteller*, 2 Cranch., 10-24, Chief-Justice MARSHALL said, in a case involving quite analogous principles, although the two sections considered were in the same act:

> " In searching for the literal construction of an act, it " would seem to be generally true that positive and explicit " provisions comprehending in terms a whole class of cases " are not to be restrained by applying to those cases an *impli-* " *cation* drawn from subsequent words, unless that implication " be very clear, necessary and irresistible."

Section 860 is expressly applicable to actions for the enforcement of a penalty and prescribes that "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding * * * shall be

given in evidence, or in any manner used against him" in such an action.

The section was originally enacted in 1868. Its general intent seems to be to forbid extracting from a party self-incriminating record evidence.

Is a *subpœna duces tecum* within the intent of the section?

The section is not limited to prohibiting the use of evidence obtained in some prior proceeding. It prohibits *using in any manner* in the action on trial any *discovery* or disclosure of books *obtained* by means of a *judicial proceeding* or process, which a *subpœna duces tecum* certainly is.

In *Johnson vs. Donaldson*, 3 Fed. Rep., 22 (1880) in a *qui tam* action under R. S., 4965, the plaintiff had subpœnaed the defendant's books, but the court excluded them and plaintiff's case failed for lack of evidence. Upon a later motion for a new trial, Judge WALLACE, upon deliberate consideration, held that a plaintiff could not by *subpœna duces tecum* compel a defendant to produce his books of account and applied section 860 to support the ruling.

The term *judicial proceeding* is comprehensive; a broader term could hardly have been used. If a party's answer, containing admissions in a prior suit cannot be used against him in a later *qui tam* action, it would seem unreasonable to hold that the same admissions may be extorted from the party in the later action by means of a subpœna. Suppose the party to have been examined as a witness and his books involuntarily produced on a trial of some former action; the evidence then obtained could not be used against him on the trial of the later *qui tam* action. It would be inconsistent with the principle of the statute to permit the same evidence to be given on the trial of the later action by simply compelling the attendance of the party and his books by subpœna.

The policy of § 860 seems reasonably plain. It is that a plaintiff in a penal action must prove his case without extorting evidence from the adversary *party* indirectly or directly.

Tucker vs. U. S., 151 U. S., 164, held that "discovery or evidence" Sec. 860, "includes only facts or papers which "the party or witness is compelled by subpœna, interrogatory 'or other judicial process to disclose, whether he will or not."

A *subpœna duces tecum* is a writ and requires the production in court of books specified therein, and the issuance and service of the writ precedes the production. It is compulsory upon the party in that it commands the party to produce and requires obedience under penalties. The books are evidence or contain evidence against the party, and disclosure of their contents would seem to be evidence against the party by means of the compulsion of a judicial proceeding.

In *Johnson vs. U. S.*, 163 Fed. Rep., 30, an involuntary bankrupt was being tried for concealing property from the trustee. His schedules were admitted in evidence against the bankrupt over his objection. This was held by the Circuit Court of Appeals (1st Circ.), Mr. Justice HOLMES presiding and writing the opinion, to have been reversible error, on the ground that the schedules were in the nature of a pleading, that they were filed in an involuntary proceeding, and in compliance with the act. The decision was based " on the broad ground that the schedules are protected by R. S., §860."

To require a party " to furnish evidence to convict himself of a crime, or subject himself to a penalty or a forfeiture " would be " a violation of one of the most familiar rules of the common law." Judge WALLACE in *Johnson vs. Donaldson (supra).*

The same appreciation of the common law was expressed at length and with much emphasis in *Boyd vs. U. S.*, 116 U. S., 631.

Mr. Justice BLATCHFORD remarked in the opinion of this court in *Counselman vs. Hitchcock*, 142 U. S., 547-563 as follows :

" It is an ancient principle of the law of evidence, that a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to criminate him or subject him to fines, penalties or forfeitures." [1]

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[1] *Rex vs. Slaney*, 5 Carr. & P., 213 ; *Cates vs. Hardacre*, 3 Taunt, 424 ; *Maloney vs. Bartley*, 3 Camp., 210 ; 1 Starkie on Evidence, 71, 191 ; Case of *Sir John Freind*, 13 Howell's State Trials, 16 ; *Case of Earl of Macclesfield*, 16 Howell's State Trials, 767 ; 1 Greenl. Ev., § 451 ; 1 Burr's Trials, 244 ; Wharton's Crim. Ev., 9th ed., § 463 ; *Southard vs. Rexford*, 6 Cowen, 254 ; *People vs. Mather*, 4 Wend., 229 ; *Lister vs. Boker*, 6 Blackford, 439.

See, also, the observations of Mr. Justice BROWN upon this matter and the origin of the maxim *nemo tenetur seipsum accusare* in *Brown vs. Walker*, 161 U. S., at pp. 596, 597.

Section 860 was enacted to establish that common law principle firmly in the statutes. The violation of it is not less if the *subpœna duces tecum* is used to obtain that which the spirit and letter of the statute forbids.

Both Sections 724 and 860 R. S. Apply to Corporations.

Sections 724 and 860 use the terms *parties* and *party*. These terms are broad enough to include corporations. Both sections also use the term *him* and *his;* but section 1, Rev. Stat., provides, in respect of determining the meaning of words used therein that "words importing the singular number may extend and be applied to several persons or things;" and "the word 'person' may extend and be applied to partnerships and *corporations*," unless the context shows that such words were intended to be used in a more limited sense.

There seems to be nothing in the context of either section which requires the word *him* to be limited to a natural person, or prevent the inclusion of a corporation in the terms *party* and *parties*.

Heretofore in applying sections 724 and 860 R. S. no distinction has been made between natural persons and corporations, and none has been suggested.

Gregory vs. Chicago, M. & St. P. R. Co., 10 Fed. Rep., 529 (1882).
Washburn & Moen vs. Freeman Wire Co., 41 Fed. Rep., 410.
Merchants' Bank vs. State Bank, 3 Cliff, 201 (1868).
Havemeyers vs. Compagnia Transatlantique, 43 Fed. Rep., 90.
Kirkpatrick vs. Pope Mfg. Co., 61 Fed. Rep., 46 (1894).
Exchange Nat. Bank vs. Washita Cattle Co., 61 Fed. R., 190.
U. S. vs. National Lead Co., 75 Fed. Rep., 94.
Lucker vs. Phœnix Co., 67 Fed. Rep., 18.
Newgold vs. American E. & N. Co., 108 Fed. Rep., 341.

Victor G. Bloede Co. vs. Joseph Bancroft Sons Co., 110 Fed. Rep., 76.
Safford vs. Ensign Mfg. Co., 120 Fed. Rep., 480.
U. S. vs. Bitter Root D. Co., 133 Fed. Rep., 274.
General Electric vs. Westinghouse Co., 144 Fed. Rep., 458.

"A uniform construction ever since enactment for a long period, in this case over thirty-five years, engenders doubt of a new and different construction" (head note).
Merchants' Nat. Bank vs. United States, 214 U. S., 33.

When a corporation is a party and its books are produced and proved, the entries in those books become original evidence. The entries themselves speak. Reading them to a jury does not add to their evidential force; the person who reads them is merely a convenient translator.

If the policy of the common law and of the statute proceeds from a disposition to give the accused fair play and to prudently deprive the state of the power of inquisitioning a culprit whom it is to judge, and, possibly, to punish, lest that power be abused,[1] the policy seems applicable, in general, to corporations as well as to natural persons.

A statute in harmony with the common law should not be construed in derogation of it, unless its terms compel that effect.

When §§ 724 and 860 were enacted, corporations were common and familiar instruments of trade, but Congress did not distinguish between them and natural persons, and did include both in the term *party*. The courts should not distinguish between them now. It is for the legislature to make the distinction.

The opinion of this Court in Hale vs. Henkel does not deprive a corporation of the protection of Sections 724 and 860, or of the common law rule that a defendant shall not be compelled to

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[1] See *Brown vs. Walker*, 161 U. S., 596-7.

give evidence to convict itself of a crime or subject itself to a penalty or forfeiture.

The trial Court and the Circuit Court of Appeals grounded their rulings, in excluding the defendant's books from the protection of § 724 and § 860, on the decision of this Court in *Hale vs. Henkel*, 201 U. S., 43. The trial Court did not specifically mention that case by name, but the Court of Appeals did (R., p. 184), and the trial Court must have intended it (see R., pp. 43 and 46).

In *Am. Banana Co. vs. United Fruit Co.*, 153 Fed. Rep., 943, Judge LACOMBE said that *Hale vs. Henkel* had "modified the rule heretofore applied when the books and papers sought to be dragged to light by the power of the state are the property of a corporation." The remark was made in an action for triple damages under the *Anti-Trust* Act, and upon a motion under Section 724 for production of books, and the learned judge added: "It would seem to make little difference whether the books and papers are called for under a *subpœna duces tecum* or under Section 724" and this seemed to be the position of the trial judge in this case. We respectfully submit that the learned judge overlooked the consideration that the statute (§ 724) existed for regulating the production of books and the procedure prescribed by it was incumbent upon the Court, which was not at liberty to adopt any other procedure, whether the result might be the same or not. The Court might interpret, but was not at liberty to free itself from the statute entirely.

Hammond vs. Sailors Union, etc., 167 Fed. Rep., 825.

The decisions of this Court preceding *Hale vs. Henkel*, and so to speak, leading up to the latter, were investigations or prosecutions under the Interstate Commerce Law of February 4, 1887 (24 Stat., 379, ch. 104) and the amendments thereto (March 2, 1889, 25 Stat., 855, ch. 382 and Feb. 10, 1891, 26 Stat., 743, ch. 128) and the questions came to this Court upon writs of *habeas corpus*, sued out by officers of the corporations which were being pursued. None of those cases were actions

at law, and, in none of them were sections 724 or 860, R. S., invoked as an obstacle to discovery.

That Act authorized the Interstate Commerce Commission to invoke the aid of any Federal Court in requiring by *subpoena* or order the attendance and testimony of witnesses, and *the production of books and papers* (section 12 of 26 Stat., 743, ch. 128).

The explicit statutory authority of section 12 made sections 724 and 860, R. S., inapplicable to prosecutions under that Act so far as they were incompatible with the authority conferred by section 12, but section 12 did not purport or operate to repeal or modify sections 724 or 860 in respect of any other prosecutions.

The cases following *Boyd vs. U. S.* antecedent to *Hale vs. Henkel* were

Counselman vs. Hitchcock, 142 U. S., 547 (Jan., 1892).
Interstate Com. Com. vs. Brimson, 154 U. S., 447 (May, 1894).
Brown vs. Walker, 161 U. S., 591 (March, 1896).
Interstate Com. Com. vs. Baird, 194 U. S., 25 (April, 1904).

In all of them the question was in respect to the guarantees afforded to witnesses by the Amendments to the Constitution.

It was, of course, competent for Congress to make §§ 724 and 860 inapplicable to investigations under the Interstate Commerce Law.

Hale vs. Henkel.

In *Hale vs. Henkel*, 201 U. S., 43 (March, 1906), the proceeding was under the Sherman or Anti-Trust Act of July 2, 1890 (26 Stat., 209). The immunity Act of February 25, 1903 (32 Stat., 854, 904), also applied to prosecutions under this Act.

Section 4 of this act authorized *proceedings in equity* to prevent and restrain violations. *Equity*, as shown above (*ante*, p. 26), has in several cases sustained the use of the *subpœna duces tecum*, as a substitute for bill of discovery, but

never to enforce a penalty. Section 7 of the act also authorized the recovery of triple damages, but this could be only by an action at law.

The proceedings *in equity* under § 4 must be brought by the District Attorney under supervision of the Attorney General, and, necessarily, be in the name of the United States. Proceedings under § 7 for triple damages must be brought by the *person* "injured in his business" and must necessarily be at law.

The illegal *confederation* is not punishable at all under sections 1, 2 and 3, though it is liable to injunction under § 4; only the *confederates* may be punished under those sections, whether they are natural or artificial persons being immaterial.

Section 724 R. S. could not have been applied to the case.

The *Tobacco* Co. could not have invoked section 724 because the proceedings against *it* was not an action at law. Hale, an officer, could not have invoked it for the same reason.

Hale, an officer of the Tobacco Company, had been commanded by a *subpœna duces tecum* to appear before the grand jury and produce certain papers.[1] He appeared, refused to answer *all* questions except as to his identity, and refused to produce any papers on the grounds, *inter al.*, because they might tend to incriminate him, and he invoked the protection of the 5th Amendment. This Court held that the protection from self-incrimination guaranteed by the 5th Amendment was "a personal privilege of the witness," and in so holding, said (p. 69):

"It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person. A privilege so extensive might be used to put a stop to the examination of every witness who was called upon to testify before the grand jury with regard to the doings or business of his principal, whether such principal were an individual or a corporation. * * * The Amendment is limited to a person who shall be

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[1]That use of the *subpœna duces tecum* seems to have been analogous to its use for bringing into court the books of one not a party, or the books of a party in a civil (not penal) proceeding, because, as already said, the *confederation* is not punishable, although liable to injunction, and only the *confederates* or parties to it are punishable, and the books were not theirs.

compelled in any criminal case to be a witness against *himself*, and if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation."

The witness was himself immune under the immunity statute.

The ruling seems to have been based upon the distinction between an *individual* who owes no duty to the state to divulge his business, and a *corporation* which is the creature of the state.

"There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose" (*Opinion*, p. 75).

A majority of the Court appears to have concurred in that view.

The holding appears to have been and should be limited to cases where a statutory right of examination is exercised in an investigation *by the state* whether the corporation has exceeded its franchise powers.

The opinion expressly states (p. 75) that: "It is not intended to intimate, however, that it (Congress) has a general visitatorial power over state corporations" and (p. 67) "we do not wish to be understood as holding that a corporation is not entitled to immunity under the Fourth Amendment against *unreasonable* searches and seizures. A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body."

And at page 69 the opinion of the court states:

"The question whether a corporation is a 'person' within the meaning of this Amendment (Fifth) really does not arise, except, perhaps, where a corporation is called upon to answer a bill of discovery, since it can only be heard by oral evidence in the person of some one of its agents or employees."

And Mr. Justice McKenna, in his concurring opinion, said (page 82):

"until such power is exercised" (*i. e.*, legislation requiring disclosure from corporations) "there may be reasons for holding that corporations are entitled to the protection of the 4th Amendment," although he added, "there are reasons against it,"

and he did not wish to preclude future consideration of the question.

The question whether discovery was compellable from a corporation, in a *penal* action at law, without a statute sanctioning it, was not presented in *Hale vs. Henkel.*

That question does arise in the case at bar. Could a bill of discovery have been maintained against the Lithographic Company and could it have been required by answer to disclose whether or not it had made infringing copies of the copyrighted picture in the absence of a statute requiring a defendant to make disclosure in such a case. Under the ruling in U. S. vs. Saline Bank, 1 Pet., 100, a corporation would not be compelled to make discovery in such a case. And if there were such a statute, would the corporation, as an aggregate person, be enough of a "person" to be within the constitutional protection of the Fourth and Fifth Amendments?

Nelson vs. U. S., 201 U. S., 92, was argued in this Court immediately following *Hale vs. Henkel*, and was decided on the same day as the latter.

In that case the government had brought a *bill in equity* under section 4 of the Anti-Trust Act and had served a *subpœna duces tecum* upon the officers of the defendant corporation to testify and produce books, &c., before an *examiner in equity.* The officers refused to answer certain questions and refused to produce books, after being ordered by the court so to do, and were adjudged in contempt.

The proceeding in the Circuit Court being *in equity*, must have been under section 4 of the act to prevent and restrain a violation of the act. There was no *penal* feature about it. The judgments in contempt were sustained in this Court on the grounds that the privilege secured by the 4th and 5th Amendments are personal to the parties (see p. 116).

Assuming the disclosure sought by the government in the

case just cited to have been made, could the evidence thus obtained have been used against the corporation in an *action at law* for triple damages brought by a third person injured by the combination under § 7 of the act (assuming such an action to be *penal* in character), in view of § 860, R. S.?

In *Alexander vs. United States* and *General Paper Company* against same, 201 U. S., 117, decided contemporaneously with *Nelson vs. United States*, a witness refused to answer questions or produce books before an examiner *in equity* on the ground of immateriality and the privilege of the Fifth Amendment. The court had overruled the objections and ordered the witness to answer and produce the books. On the appeal from that order this court held that it had no jurisdiction to review the order because it was interlocutory. The opinion of Mr. Justice McKenna did not distinguish the contentions made by the corporation from those made by the witnesses. The merits of those contentions were not considered because of the lack of jurisdiction of this court. As the suit was in equity Section 724 could not have applied to the contention of the General Paper Co. and the Anti-Trust act of July 2, 1890, does not authorize a suit in equity for the recovery of penalties. The question now presented was not decided by either the *Nelson* or the *Alexander* case.

In *Doyle vs. London Guarantee Co.*, 204 U. S., 599 (1906), the question came to this court upon a certificate of the Circuit Court of Appeals asking the opinion of this court whether it had jurisdiction to review a judgment for contempt for refusal to produce books which the defendants had, by an order of the trial court, been directed to produce. On the writ of error in this court, the plaintiff in error urged (see p. 608) that the only authority of the Circuit Court to make an order for the production of books in a common law action was under Section 724. But this court did not consider that question because it was not within the question certified, and this court only held that the Court of Appeals did not have jurisdiction to review the contempt judgment, that being only interlocutory in the case.

In *Webster Coal & Coke Company vs. Cassatt*, 207 U. S., 181 (1907), it appeared that the Webster Co. had brought an action in the Circuit Court against a railroad company to recover damages for an alleged violation of the Interstate Com-

merce Act (of Feb. 4, 1887). Upon a petition of the Webster Company, under Sec. 724 R. S., the Circuit Court ordered that Cassatt and others, the officers of the railroad company, produce certain books on the trial and also before the trial for inspection. Cassatt took a writ of error to the Court of Appeals (3rd Circuit) and that court entertained jurisdiction of the writ of error, regarding the order as a final decision and reversed the order of the Circuit Court. The case came to this court on *certiorari*. This court reversed the judgment with a direction to the Court of Appeals to dismiss the writ of error. This holding was on the ground that the officers, Cassatt *et al.*, had no interest in the matter and were not affected by the order of the Circuit Court unless the proceedings therein should take the form of a judgment for contempt for disobedience. The action which the Webster Co. had brought was to recover a penalty, and this court did not consider whether the order to produce in such a case under Sec. 724 was valid or warranted judgment by default against the defendant company (see opinion, p. 187).

In *Consolidated Rendering Co. vs. Vermont*, 207 U. S., 541, the rule of *Hale vs. Henkel* was considered.

The case was on error to the Supreme Court of the State of Vermont. A statute of Vermont provided for the service upon a corporation doing business in the state and a notice to produce books before any court or grand jury which contained any account or information concerning the subject of inquiry before the tribunal, *acting under the authority of the state.* The corporation when such notice was served upon it, was, *by the statute*, directed to produce the books and papers as required. If the corporation without reasonable cause should neglect or refuse to comply, it might be punished as for contempt.

The grand jury were investigating a complaint which had been made against certain *individuals* relative to selling diseased meat, and had caused a notice under the statute to be served upon the plaintiff in error. That company did not fully comply. The grand jury reported the facts to the court and the *Attorney-General* petitioned that the company be proceeded against for contempt; the company moved to dismiss the proceeding on the ground, among others, that the proceedings sought to compel the company to produce papers which might

tend to incriminate it and were contrary to the provisions of the 4th, 5th and 14th amendments. The court found the papers wanted to be material to the grand jury's inquiry, that the company could produce them, and found the company guilty of contempt. From that judgment writ of error was taken to this Court. The *Fifth* contention of the company here was:

"That the statute and notice required the company to "produce writings which tend to incriminate it, without ex- "tending immunity against criminal prosecution."

To which this Court said (p. 552):

"The fifth objection is also without merit, even upon the assumption that in such a case as this the company could take the objection through the witness. The court simply held that it could not determine whether the objection as to incrimination was valid until the books were produced for inspection by the court, though before they were to be used in evidence. *If, after that inspection, any portion were found of that character, the court held that such portion would be excluded.* As, however, the company failed and refused absolutely to produce any of the books, with some unimportant exceptions, it was adjudged to have failed to show any reasonable cause for such refusal to comply with the requirements of the notice, and it was fined for the contempt."

The opinion recognized the obligation of the court to *exclude* self-incriminating evidence as against the corporation, if such should be found in its books.

Amendments IV. and V. do not restrict the States, but operate only on the Federal government.

Brown vs. New Jersey, 175 U. S., 174.

In *Hammond Packing Co. vs. Arkansas*, 212 U. S., 322, a judgment for $10,000 had been given in the State Court against the Hammond Co. as penalties for a violation of the Arkansas Anti-Trust Act, for default to produce books in compliance with a court order in an action brought to revoke its permit to do business in the state and for penalties (pp. 330 and 334). The Anti-Trust Act of Arkansas authorized in such cases the state's officers to require the production of books and a default judgment for non-compliance (pp. 336 and 339).

The principle on which this court's ruling was based, was the right of the State of Arkansas to prescribe the conditions on which it would permit a foreign corporation to do business in the State. The State's action was one of visitation to inquire whether the corporation doing business in the State was obeying its laws and to punish it and exclude it from the State if it was found to have disobeyed its laws.

Sections 724 and 860 do not apply to state court procedure. Hence, cases like *Waters-Pierce Co. vs. Texas*, 177 U. S., 28, are not relevant.

N. Y. Life Ins. Co. vs. People, 195 Ill., 430, was an action to recover a penalty, and the error alleged was requiring an agent to incriminate himself. It was held that the privilege was a personal one, and as the witness did not claim the privilege, the company could not and the latter only appealed. No question of books was involved. This case is referred to because it was cited by defendant-in-error below.

The foregoing decisions leave the questions now presented entirely free from precedent in this Court.

We conclude, upon the arguments above submitted, the compulsory production of defendant's books under the *subp. duces tecum* was reversible error.

The Error is Cause For Reversal.

That there was reversible error in the compulsory reading of the book entries is apparent from the court's charge (R., pp. 158, 159). *Inter al,*

"* * * and from those books we get the information that at a time subsequent to these negotiations or dealings, whatever they were, between the salesman of the defendant and the representatives of the Tobacco Company, that there was charged by the Lithographic Company, the defendant, to the American Tobacco Company, certain of these copies having this name, and you have heard the number described ; it runs along up, I think, into the thousands—at least into the hundreds ; you heard the evidence, and it is for you to say. There they are charged to the American Tobacco Company, and then you find credit, at least, on account. The evidence of these credits appearing on the books do not show that they correspond specifically, but there are the credits running down somewhere into 1904, and you have heard the evidence that

they had other dealings. Of course, you will find that the whole account, including the charge for these pictures which are described in the books, the same name, I think, as this in evidence, substantially, that it is all paid except some $50 or $60; you have heard the amount. * * * and now the books show, plaintiff contends that the American Lithographic Company has charged for these copies to the American Tobacco Company, an that its books show that it has been paid for them by the Tobacco Company."

And after the Court's attention was specially directed to the matter by defendant (R., p. 163):

"MR. JENNER: I ask your Honor to charge that there is no connection between the defendant's books and the pictures found at the Tobacco Company.

"THE COURT: No connection between them?

"MR. JENNER: Between the defendant's books and the pictures found.

"THE COURT: In some senses that is true, but in the sense that one refers to the others and the charges in the books which you have heard read here, and which have been produced here, are charges for this picture or copies of it, is that not true, gentlemen? Is it for anything else? Is there any evidence here that indicates anything to the contrary?"

FOURTH POINT.

The compelled production of defendant's books and reading in evidence entries therefrom, whether under the *subpœna* or the order, violated defendant's rights secured by the Fourth and Fifth Amendments.

Sections 724 and 860 are connected with the argument under this point in such manner as to leave the point free from precedent in this court.

Defendant's objection to producing its books was also based upon the 4th and 5th Amendments (Rec., pp. 144, 145), and the court's ruling is assigned as error. See assignments

of error, numbered 9th to 22nd both inclusive (R., p. 169 to 178, and 191 to 199).

Actions for the recovery of statutory penalties are within the constitutional guarantee.

Coffee vs. United States, 116 U. S., 436.

In *Santa Clara County vs. Southern Pacific R. Co.*, 118 U. S., 394, 396, this Court flatly decided that a corporation is a "person" within the meaning of the Fourteenth Amendment. Also

Pembina Mining Co. vs. Pennsylvania, 125 U. S., 181.
Missouri Pacific Ry. Co. vs. Mackey, 127 U. S., 205.
Minneapolis & St. Louis Ry. Co. vs. Beckwith, 129 U. S., 26.
Charlotte, &c., Railroad vs. Gibbes, 142 U. S., 386.
Monongahela Navigation Co. vs. United States, 148 U. S., 312.
Gulf, Colorado & Santa Fe Ry. vs. Ellis, 165 U. S., 150–4.
Chicago, Burlington & Quincy R. Co. vs. Chicago, 166 U. S., 226.

If a corporation is a "person" within the meaning of the Fourteenth Amendment, it would seem to be a *person* within the meaning of the Fourth and Fifth Amendments.

The term used in the Fourth Amendment is "the *people.*"

"The right of the *people* to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated."

Is not an aggregate of persons associated in corporate form a part of the *people?* There are several kinds of associations of persons, associated for various purposes of business or pleasure, and more or less loosely or firmly bound together (the strictness of the bond varying in different States), such as corporations, joint stock associations, mutual societies without stock, partnerships general and limited, and the individuality of the *person* merges almost imperceptibly into the solidarity of the corporation, and, if a corporation is not a person, it would be difficult to draw a line distinguishing those aggregates which are not persons from those which are.

To say that the 4th Amendment, which mentions *people*, includes aggregates, because it is a plural noun, while the 5th which mentions *person* in the singular number, includes only individuals, and excludes aggregates, does not afford a logical distinction.

This Court said in *Hale vs. Henkel* (p. 76) :

" We do not wish to be understood as holding that a corporation is not entitled to immunity, under the 4th Amendment against *unreasonable* searches and seizures."

The Amendment forbids only *un*reasonable searches.

We shall assume that a corporation is within the intent of the 4th and 5th Amendments and is entitled to protection from unreasonable searches, except when the inquisition is by the State as in *Hale vs. Henkel.*

We may inquire what is an unreasonable search.

An inquisition by means of a *subpœna duces tecum* or a court order is a *search.* This Court has so held.

In *Boyd vs. U. S.*, 116 U. S., 616, this court held (p. 622) that the compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property, is within the scope of the 4th Amendment, in all cases in which a search and seizure would be, and (p. 634) is also " compelling him to be a witness against himself, within the " meaning of the 5th Amendment and is the equivalent of a " search and seizure—and an unreasonable search and seiz- " ure—within the 4th Amendment."

In *Hale vs. Henkel*, at page 71, the opinion of the Court states

" the substance of the offense " (*i. e.*, an unreasonable search and seizure) " is the compulsory production of private papers, whether under a search warrant or a *subpœna duces tecum.*"

Since the unreasonableness of a search does not depend upon the *manner* of it, or the *warrant* for it, it would seem to depend upon the *motive* and *object* of it.

An Act of Congress may make that *reasonable*, at least presumptively, which, in the absence of such legislation, would be *unreasonable*, that is, a search which would be unreasonable if not sanctioned by a statute, would be presumptively reason-

able if so sanctioned. And a search *forbidden* by a statute would be an *unreasonable* search because it is illegal as well as unsanctioned.

We do not, of course, mean to say that Congress can make a search reasonable within the constitutional guarantee which is, in its nature, unreasonable. It is for the courts to determine ultimately that quality of a search, as the courts have always done. But we may say that Congress may make a search presumptively reasonable, and a search forbidden by Congress is unreasonable by that fact alone.

In *Hale vs. Henkel*, the majority opinion states (p. 77):

"We do not wish to be understood as holding that an examination of the books of a corporation, *if duly authorized by Act of Congress*, would constitute an unreasonable search and seizure within the 4th Amendment."

That limitation of the opinion clearly leaves open the position that such an examination, if *not* authorized by legislation, *would* or *might* constitute an unreasonable search. That is our position, under this point, and *Hale vs. Henkel* is not authority against it.

In the *Boyd* case this Court held a search to have been unreasonable which was sanctioned by a statute, and held the statute itself to be unconstitutional. In *Hale vs. Henkel*, this Court held a search to be reasonable or rather, not unreasonable, which also was substantially sanctioned by statute.

Now, in the *Boyd* case the *object* of the search was to cause a forfeiture of money and property. In *Hale vs. Henkel* the object of the search was to ascertain whether the corporation was engaged in a systematic violation of its franchise powers.

In the *Boyd* case, there was a proceeding *in rem* to establish a forfeiture and recover a penalty, and there was a court order to produce an invoice for the inspection of the government attorney and to be offered in evidence. In *Hale vs. Henkel* there was an inquisition by a grand jury to inquire whether the franchise powers of the corporation had been systematically exceeded.

So considered there is a distinct line of demarkation between the two cases.

The province of the grand jury was to accuse. It by no means followed, that on a subsequent trial the evidence taken

by the grand jury from the corporation's books could have been used against it to recover penalties under § 7 of the Anti-Trust Act, in view of the protection given by section 860, R. S., which applies to *parties*.

The case at bar falls within the rule of the Boyd case.

In penal cases under the copyright law compulsory production, *i. e.*, search and seizure, whether by order, search warrant or *subpœna duces tecum*, is not only *not* sanctioned by a statute, but it is positively forbidden by § 724 and § 860 in respect of *parties*, without distinction as between individuals and corporations. Therefore that search is *unreasonable* and, if so, is within the inhibition of the 4th Amendment.

In the case at bar, the trial court, under § 724, ordered the defendant to produce its books, and in aid of that order reordered production under the writ of *subpœna duces tecum*, and threatened punishment in case of refusal. That was a search (under the *Boyd* case and also under *Hale vs. Henkel*), and an unreasonable search, because, in effect, forbidden by § 724. If § 724 be regarded as not trammelling the court's action under the *subpœna duces tecum*, still the search was unreasonable, because sections 724 and 860 declare what public *policy permits* in respect of searches in actions at law for penalties, and a search not conforming to that policy is not reasonable.

Section 724 requires a prior motion, upon reasonable notice, and an order made thereon, thereby affording opportunity for presenting reasons *pro* and *con*, and for deliberation by the court, which is a very important right for the party pursued.

Thompson vs. Selden, 20 How., 194 (1857).

If that is the policy of the law, it is not served by a *subpœna duces tecum* issuable at the discretion of the pursuing party.

A *subpœna duces tecum* being a search, if the right to it exists as a remedy cumulative to that of section 724, R. S., then, being unregulated by statute, and being free from the restrictions imposed in discoveries under section 724, it is an *unreasonable* search, when issued in a penalty or forfeiture case.

If, at the option of a party in a penal action, the books and papers of the adverse party may be brought into court by a

subpœna, and opened before the jury, and interrogatories be based thereon to ascertain their materiality, the adverse party can hardly be deemed to be secure in respect of books and papers or protected in respeet of self-incriminating evidence.

FIFTH POINT.

The Circuit Court erred in not directing a verdict for defendant on the ground that no offending sheets had been or were found in defendant's possession.

At the close of the plaintiff's case the defendant moved to dismiss the complaint or for the direction of a verdict on the grounds (see Rec., p. 155):

FOURTH. "That there is no evidence in the case of any "copies of the painting which were in the possession of de- "fendant or by it sold or exposed for sale within the meaning "of Section 4965."

FIFTH. "That there is no evidence of any copy of the "painting as distinguished from photographs or photogravures "having been in possession of the defendant or by it made, "sold or exposed for sale."

The motion was denied and defendant excepted (p. 155).

The ruling of the Court is assigned as error by the Thirty-second and Thirty-third assignments of error (p. 180).

Facts Material.

Exhibit G is the alleged infringement (marked for identification, R., p. 31, in evidence, p. 121).

Of Ex. G, 203 copies were *found* in the premises of American *Tobacco* Co. (*Von Schrenk*, R., p. 138). 993 copies "chromo-lithographs" like Exhibit 5 were found in the premises of Deuther Mfg. Co. at Buffalo, N. Y. (see stipula-

lation, R., pp. 55, 56).[1] These 203 *plus* 993, total 1,196 copies were seized in replevin proceedings against the Am. *Tobacco* Co. See judgment against *Tobacco* Co. (R., p. 109) in Replevin action adjudging said 1,196 copies to have been found in *Tobacco* Co.'s possession as alleged in the complaint in that action which set forth the finding of the said 203 and 993 copies as stated (see that complaint, p. 104). There was no evidence that Exhibit 5 was the same as Exhibit G, but plaintiff's counsel said it was (top p. 55).

The 993 copies had been sent to Deuther Co. to frame and were held by Deuther Co. " as framers " and "subject to the directions and control of the Am. *Tobacco* Co." (stipulation, R., p. 56), and they were not published.

The Am. *Tobacco* Co. was liable to plaintiff at $10 per copy on those 1,196 copies up to $10,000 if plaintiff had sued for the penalty in the Replevin action, because those copies were *found* in its possession.

Werckmeister vs. Am. Tobacco Co., 207 U. S., 375.

If plaintiff had brought that Replevin action properly, he would have recovered in that action $10,000 penalties from the *Tobacco* Co. and, on the theory of the present action, would still have had a claim for another $10,000 from the *Lithographic* Co. on the same prints.

The argument is developed below.

No copies of the alleged infringing sheets were *found* in defendant's *possession*. The court in charging the jury said (Rec., p. 158, line 12):

" Now, there is evidence, and you have heard it, that subsequently the plaintiff here, through its representatives and agents and attorneys, went to the office of the American *Lithographic* Company, and there found some two or three hundred copies—you have heard the number—&c."

That was a mistake, *Tobacco* Co. was intended. It was a slip of the tongue or of the stenographer's pencil. We assert emphatically that the plaintiff by his agents or otherwise did

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[1] This stipulation is not entitled in any action, but it was made in the Replevin action against the Am. *Tobacco* Co. as appears by the objection to it at top of p. 55 and the judgment in that action at p. 109.

not go to the *Lithographic* Co.'s office, and did not find there two or three hundred or any copies, and *no copy was found by any one in defendant's office or on its premises or in its custody or control at any time. There was not a word of evidence to the contrary.* The only copies found were in possession of the *Tobacco* Co. and Deuther Co., as stated above.

The language of Section 4965 material to the present question is as follows:

"If any person, after the recording of the title of any map, "chart, dramatic or musical composition, print, cut, engraving, "or photograph, or chromo, or of the description of any "*painting*, drawing, statue, * * * shall, * * * *en-* "*grave, etch, work, copy, print, publish* * * * *or import*, "either in whole or in part, * * * or, *knowing* the same "to be so printed, published, * * * or imported, shall "sell or expose to sale any copy of such map or other article, "as aforesaid, he shall forfeit to the proprietor all the plates "on which the same shall be copied, and every sheet thereof, "either copied or printed, and shall *further* forfeit one dollar "for every sheet of the same *found in his possession*, either "printing, printed, copied, published, imported, or exposed "for sale; and in case of a painting, statue, or statuary, he "shall forfeit ten dollars for every copy of the same *in his* "*possession, or by him sold or exposed for sale*":

The thing which was technically copyrighted was a *painting* (Plff.'s Ex. E, Rec., p. 26), but the thing which was published by the plaintiff was a *print* (photograph or photogravure. See Plff.'s Ex. B, Rec., p. 10 and R., p. 11). The thing which was alleged to have been made and sold by defendant was also a *print* (lithograph). See Exhibit G (R., pp. 31 and 121).

The point we wish to make is this, that the penalty attaches in the case of a *painting* only under the same conditions as in the case of a *print;* that the intent of the statute is to differentiate a *painting* from a *print* only in respect of the amount of the penalty, $1 in case of a print, and $10 in case of a painting; and that, in both cases, a *finding in possession of the defendant* is a condition precedent to the recovery of the penalty.

Also, that only *one* action can be maintained for forfeiture of the prints and the penalties, and that action only against the person in whose possession the prints are found, and only

the prints found are forfeited and the penalty is computed upon the number found and assessed only against the person in whose possession they are found for the purpose of forfeiture.

In *Thornton vs. Schreiber*, 124 U. S., 612, the plaintiffs below and copyright owner insisted that the words "found in his possession" were to be construed as referring to the finding of the jury. But this Court held that "the word 'found' means that there must be a time before the cause of action accrues at which they are *found* in the possession of the defendant."

In *Bolles vs. Outing Co.*, 175 U. S., 262, this Court concurred with the Circuit Court of Appeals (2d Circ.) (p. 268) "that the words 'found in his possession' aptly refer to *a finding for the purposes of forfeiture and condemnation.* 'The remedy by forfeiture and condemnation is only appropriate in a case where the property *can be seized upon process*, and where, as here, the forfeiture declared is against property of the offender' is only appropriate when *it can be seized in his hands.*"

The cases cited seem to consider it necessary that the *corpus delicti* shall be found in possession as a condition precedent to recovery of penalties, but the above cases did not involve the copyright of a painting.

In *Werckmeister vs. American Tobacco Co.*, 207 U. S., 375, the action was to recover *penalties* for infringement of the same copyright as that involved here, but in that case 1196 offending sheets were proved to have been actually found in *that* defendant's possession. The plaintiff had proved a judgment roll in a former action in replevin against the same defendant (Tobacco Co.) in which the said offending sheets had been seized.* This Court held, affirming the courts below, that there could not be *two* actions, one for forfeiture of the offending sheets and another for the penalty. In so holding the court remarked that "This section of the statute is penal, and there should be a special care to work no extension of its provisions by construction."

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* The said 1196 sheets were the same 1196 sheets shown in this case to have been found in possession of the *Tobacco Co.* and Deuther Co. (see *ante*, p. 50).

In other words, the plaintiff having brought *two* actions, the first in replevin to forfeit the sheets, and the second action to recover the penalty, and having succeeded in the replevin, failed in the second for the penalty, on the ground that there could not be two actions, and that ruling was in the case of a painting copyright, the identical copyright involved here. Now, if a painting is the same as a print in respect of the statute permitting only one action for both forfeiture and penalty, why is not a painting the same as a print in respect of permitting recovery of a penalty only when forfeiture, finding in possession, is had in the same action.

The offense consists in engraving, etching, working, copying, printing, publishing or importing—or knowing the same to be so printed, published or imported—in selling or exposing to sale, but the penalty is recoverable only in respect to those found in possession.

If finding in possession is not necessary, then, successive actions may lie and successive recoveries had.

If finding in possession is not necessary in respect of a painting, then three separate actions for *penalties* could be brought against three different persons, (1) one action against the person in whose *possession* the infringing sheets are found; (2) another action against the person who *offered* them for sale; (3) another action against the person who *sold* them. And as many more actions against as many more persons as may have successively offered them for sale or sold them. Whereas, if *possession* is essential to maintaining the action, only one action can be brought and that against the person in possession for both the forfeiture and the penalty.

And this court said in *Werckmeister vs. Tobacco Co.* (*supra*), 207 U. S., at page 383):

"There is nothing in this section which seems to contemplate the method of procedure pursued in this case, namely, a separate action for the money penalty, upon the theory that it arose only in case of actual finding and judgment of condemnation, but the statute contemplates the bringing of the offender into court in one suit, in which the plates and sheets shall be seized and forfeited and the penalty recovered."

The provision respecting prints uses the word "or," that respecting paintings uses the word "either"; there is no other

material difference. Yet, *or* is sometimes, and may correctly be, used in the sense of *either*.

The entire language, with that single exception, indicates no intention to place paintings in any category different from that of prints, in any other respect than the amount of the penalty.

In *American Tobacco Co. vs. Werckmeister*, 207 U. S., 281, this Court subdued the letter of the statute to its spirit. There the defendant argued, respecting the same copyright as is now involved, that the *letter* of Section 4962 required the notice of copyright to be given on the *original* painting itself. To that contention this Court said (Opinion, p. 296):

"But the sense and purpose of the law was not changed by the lack of verbal accuracy, and we think *while the construction contended for may adhere with literal accuracy and grammatical exactness to the language used*, it does violence to the intent of Congress in passing the law, and that the requirement of 'inscription upon some visible portion thereof' should be read in connection with the first part of the sentence which requires notice to be inserted in the several copies of every edition published, on the title page if it be a book, upon some visible portion of the copy if it be a map, chart, painting, etc.

"As we have said in the beginning, the statute is not clear. But read in the light of the purpose intended to be effected by the legislation, we think its ambiguities are best solved by the construction here given, and that the Circuit Court of Appeals made no error in this respect."

And in *Pickett vs. United States*, 216 U. S., at page 461:

"The reason of the law, as indicated by its general terms, should prevail over its letter, when the plain purpose of the act will be defeated by strict adherence to its verbiage."

Holy Trinity Church vs. United States, 143 U. S., 457.
Lau Ow Bew vs. United States, 144 U. S., 47, 59.
United States vs. Corbett, 215 U. S., 233.

"The remedy by forfeiture and condemnation is only appropriate in a case where the property can be seized upon process", so said in an action for penalties (*Bolles vs. Outing Co., supra*).

Unless the provision following the semi-colon and prescribing a penalty of ten dollars is to be construed with and is

an inseparable part of what precedes, there would be no forfeiture of the sheets. But this Court held in *Werckmeister vs. Tobacco Co., supra*, that the statute *did* provide for a forfeiture of the sheets (see 207 U. S. at p. 380).

In other words, the section should be construed as follows: If any person shall engrave, etch, work, copy, print, publish or import, or knowing the same to be so printed, published or imported, shall sell or expose to sale he shall forfeit ten dollars for every copy of the same found in his possession, or knowing the same to have been so published or imported, shall sell or expose to sale, he shall forfeit ten dollars for every copy in his possession.

The words following the semicolon, to wit, "in case of a painting, statue or statuary, he shall forfeit ten dollars for every copy of the same in his possession, or by him sold or exposed for sale" are in themselves incomplete and to understand their application it is necessary to comprehend the entire language which precedes the semicolon and "sold or exposed for sale" has the same intent as the preceding words "shall sell or expose to sale." Therefore, if respecting a map or print, the forfeiture and penalty accrue from selling or exposing to sale a copy only in respect of copies found in possession (not at some time antecedent the action, but at the commencement of the action and for purposes of forfeiture) the same meaning attaches to "sold or exposed for sale" used concerning a painting

The language respecting a painting is "*in his possession.*" The preceding words are "*found* in his possession." Unless the entire language respecting a painting refers back to the preceding words, then "possession" is not qualified by "found" and proof of possession at any time would be sufficient. No reason for distinguishing between a print and a painting in that respect can be imagined.

No anomaly arises from the use of the word "sold" on the notion that the statute gives a penalty if the things have been sold and hence may be out of possession, and therefore cannot be found in possession. The thing "sold" may still be in possession of the seller, and, if so, it may be forfeited. The finding of the *corpus delicti* in possession is necessary. For-

feiture and penalties go together in the same action. There cannot be one without the other.

In the case of a map or print, the penalty attaches if the things have been *sold*, but only as to those *found in possession.*

The finding in possession is necessary to the due protection of a defendant. The action is penal, *quasi* criminal. Suppose that no copy is found in defendant's possession or anywhere else, then oral testimony of some person who has seen the alleged infringements at sometime in the past and somewhere, not necessarily in defendant's possession, must be relied upon. No certainty could exist that the alleged infringement was a copy of the copyrighted article. Certainly finding in possession is more important when the rate of penalty is $10 per copy than when it is $1.

If proof of selling, without finding in possession, is enough, then proof of *exposure* for sale without finding in possession is enough. That is, a conviction might be had on the recorded description of the painting without production of the original copyrighted thing, *and* without production of the infringement, and on *opinion* evidence of the similarity of the non-existing alleged infringement with the recorded description, and on memory evidence of the acts constituting the alleged exposure for sale, all at some time within two years. The lawmakers did not intend to subject a defendant in a *quasi* criminal action to the hazards of such evidence.

SIXTH POINT.

The Court erred in admitting in evidence the judgment roll consisting of the summons, complaint, answer, minutes and judgment in an action brought by Werckmeister against the American Tobacco Company in replevin.

The plaintiff offered these documents in evidence (R., p. 101). The defendant objected to the same as "incompetent against the defendant in this case, irrelevant to any issue in

the case, and immaterial." The objection was overruled, and the defendant excepted (R., p. 101).

The error is covered by the twenty-third assignment of error (R., p. 178). The papers are Complainant's Exhibit P and are found at pages 102-109 of record.

The action was brought by Werckmeister against the *Tobacco* Company in Replevin, and therein the United States Marshal seized 1,196 sheets of the alleged infringement then alleged to be in the possession of the *Tobacco* Company (R., p. 109).

The summons in that action was dated June 20th, 1902 (R., p. 102). The complaint therein alleged that at the time of commencing the action the *Tobacco* Company had *in its* possession 7,338 sheets (R., p. 104); that the Tobacco Company had caused the copies *to be printed* for it by the American Lithographic Company, and, upon delivery thereof to the Tobacco Company, the latter published *some* of said sheets; that the unlawful printing and publication had been done before the commencement of the action and within one year previous thereto (R., p. 104).

That at the commencement of the action 203 of said copies had been seized by the United States Marshal, then in the Tobacco Co.'s possession, and 993 other copies then in the Tobacco Co.'s possession had also been seized on the premises of the Deuther Mfg. Co. at Buffalo, N. Y. (R., p. 104).

The Tobacco Company's answer admitted that it had on June 26th certain copies of the picture *which had been made for it* by the Lithographic Company, but denied knowledge as to how many, and admitted that on June 26th, 1902, the Marshal had seized and carried away 113 copies (R.. p. 105).

In that case the court directed a verdict for the plaintiff, and the judgment adjudged that the plaintiff therein retain possession of the 1,196 sheets found in Tobacco Co.'s possession as alleged in the complaint, the "*said sheets having been made in violation of the plaintiff's copyright*," and that the same was forfeited to the plaintiff (R., p. 109).

Plainly the said judgment roll was incompetent evidence against the defendant in the action now at bar. The Lithographic Co. was not a party to that action, and nothing which was pleaded by either party or adjudged in that action was

binding on the Lithographic Co. or could legally prejudice it in any manner.

Nor did the fact that the solicitors for the Tobacco Company in that case were the same solicitors as appeared for the Lithographic Company in the case at bar, nor the fact that Mr. Donaldson, the vice-president of the Lithographic Company, wrote to Mr. Parker of the Law Department of the Tobacco Company on July 7, 1902, acknowledging receipt of the summons in the case against the Tobacco Company and reciting and understanding that "our counsel" (the Lithographic Company's counsel) is to appear for your company (the Tobacco Co.) "as well as for ourselves and without any claim to compensation from you," affect the incompetency of the judgment roll as against the Lithographic Company in the action now at bar.

If the effect of Mr. Donaldson's letter was to make the Lithographic Co. the real defendant in the replevin action against the Tobacco Co., the latter becoming only a nominal defendant therein, then the judgment roll was improperly introduced under Rev. Stat., Sec. 860, which provides that no pleading of a party nor discovery of evidence obtained from a party by means of a judicial proceeding shall be used against him in an action for the enforcement of any penalty or forfeiture.

The matter of the Judgment Roll was prejudicial to the defendant.

The complaint in that action against the Tobacco Co. was, of course, incompetent as a self-serving declaration and the judgment was incompetent and irrelevant to any issue on trial.

That the error was material is shown by the charge of the Court. The court charged in part as follows:

"Now, there is evidence, and you have heard it, that subsequently the plaintiff here, through its representatives and agents and attorneys, went to the office of the American Lithographic *(sic)* Company and there found some two or three hundred copies—you have heard the number—like Exhibit G, copies of that copyrighted picture, in their possession, and you have heard some evidence here as *to the finding of other copies in Buffalo* with certain people who have been described. Now, there is evidence as to the actual existence of certain of these copies, amounting to several hundred. Now

who made them, who printed them, who sold them, was it the American Lithographic Company that *made* them under this evidence— ? " (R., p. 158).

The Court meant the "*office*" of the American *Tobacco* Company, and not the Lithographic Company, the error being a *lingual* one, because, as already stated, there was no evidence, not the slightest, that any copy was ever found in the possession of the Lithographic Company.

The Court also said to the jury as follows (p. 159) :

"and plaintiff says a part of the copies, several hundred, have been found in the possession of the Tobacco Company and others at Buffalo."

There was no other evidence than that furnished by the incompetent Judgment Roll that the copies so found had been *made* by the Lithographic Co.

It was essential for plaintiff to prove that the *Lithographic* Co. had *made* the copies, or, knowing them to have been illegally made, had sold or exposed for sale. There was no evidence of exposure for sale, none of sale unless by defendant's books (illegally produced), and none of *making* except by the incompetent judgment roll.

The complaint in that action had alleged that 7,338 sheets had been in the *Tobacco* Company's possession, that it had "*caused* said copies to be printed for it by the *Lithographic* Co.," that 203 plus 993, total 1196 sheets, had been seized, and that those replevied were a part thereof (R., p. 104). The Judgment in that action adjudged that those 1196 sheets were found in the Tobacco Company's possession "all as alleged in the plaintiff's complaint" (R., p. 109). That evidence, there being none other, excepting that the defendant here carries on the business of lithographing, could persuade the jury, in view of the comments of the charge, that the Lithographic Co. had made them.

SEVENTH POINT.

The Court erred in permitting the following evidence from Percival S. Hill.

Plaintiff's counsel put the following question to Mr. Hill (R., p. 116):

"Q. Were the facts to which you swore in that answer on July 22, 1903, true to the best of your knowledge?"

The question was objected to on the grounds of immateriality, incompetency, irrelevancy and as improper, which objection was overruled and defendant excepted (R., p. 116).

The witness answered "They were" (R., p. 116).

Defendant's counsel moved to strike out the answer, with the result (p. 117):

"THE COURT: I am not ruling that they are evidence here against this defendant. I will see what there is of it. He has stated that they were true. Now, that may stand. Exception by defendant."

The alleged error is covered by the 26th Assignment of Error (R., p. 179).

The answer sworn to by the witness on July 22, 1903, was the answer of the Tobacco Company in the replevin suit, which was verified on that day by Mr. Hill as an officer of the Tobacco Company (R., p. 107). See complaint at page 102 and prayer for relief page 104. The answer was a part of the judgment roll in the replevin suit, the whole being plaintiff's exhibit P (R. p. 101).

The answer of the *Tobacco Co.* verified July 22nd, 1903, admitting that it had "certain lithographed copies of a picture which had been made for the defendant by the American Lithographic Company" and this admission was coupled with other allegations connecting the copies with the alleged infringement (R., pp. 105, 106).

The incompetent evidence thus elicited tended to prove plaintiff's allegation that the *Lithographic* Co. had made the infringement.

A mistake occurred in drafting said 26th assignment, which

erroneously refers to the answer having been made in an equity action instead of in a replevin action.

Werkmeister had brought two actions, one the action *in replevin* against the *Tobacco* Company, the judgment roll, including the pleadings, being put in evidence by the plaintiff below as Exhibit P (R., pp. 101 to 109). The judgment roll (replevin) is discussed under the Sixth Point above. The answer in that action was verified July 22, 1903 (R., p. 107). Another action had been brought by Werckmeister against both the *Tobacco* Company and the *Lithographic* Company, which was in *equity*. The bill of complaint and both answers in that suit were put in evidence by the plaintiff below and marked Exhibits R and Q (R., p, 112), and a stipulation barring the use of the proceedings in that suit, as the defendant claimed, was put in evidence as Exhibit U (p. 112). The admissibility of the pleadings in the equity suit occasioned discussion, objections by defendant and rulings adverse to defendant and exceptions, but the papers in that suit, excepting the stipulation, do not appear to have been printed in the record, although error was alleged as to them by the 24th assignment (R., p. 178).

The 26th assignment, which is now being discussed, erroneously refers to the answer sworn to on July 22, 1903, as having been made in the *equity* case. That this was a mistake in drafting that assignment appears from the fact that the same witness was asked as to the truth of the matters contained in the Tobacco Company's answer in the equity case by an independent following question (R., p. 117), that answer being Exhibit Q (R., p. 117).

That mistake in drafting the 26th assignment is, we submit, not one of substance.

Flickinger vs. First Nat. Bank, 145 Fed. Rep., 162 (C. C. A., 6th Circ.).
R. S., Sec. 954.

If we are right in this, we may pass to the alleged error contained in the ruling.

The witness was asked whether the facts stated in the answer sworn to July 22, 1903, were true "to the best of your knowledge." He may have had no knowledge on the subject. The answer of the Tobacco Company referred to in the question admitted that "the defendant (Tobacco Company) has

certain lithographed copies of a picture which has been made for the defendant by the American Lithographic Company, &c., and that these copies had been seized by the marshall" (R., p. 105).

The witness was, therefore, permitted to say to the jury that that fact was true to the best of his knowledge and it did not appear that he had any knowledge on the subject, and it did appear that he had no knowledge on the subject (see R., p. 110) "I have no recollection that previous to verifying that answer I had any interviews or conversations with the American Lithographic Company" (R., p. 110) and "I remember that there was a poster gotten up for Old English, a hanger as we called it, and it was proposed being used, and I understood that we were not to be permitted to use it. That is about the extent of it. I think I had no communication with the American Lithographic Company about it. I do not know of any communications with the American Lithographic Company about it" (R., pp. 110, 111).

The question erroneously allowed and answered was put after the above evidence disclaiming that he had any evidence on the subject.

The testimony objected to was prejudicial to defendant in the same manner as the judgment was.

EIGHTH POINT.

The Court erred in refusing to direct a verdict for defendant on the ground that there was no evidence that any of the alleged infringing sheets were made, worked, printed or copied by defendant since July 17, 1901.

The seventh ground of defendant's motion to direct a verdict was that

"No evidence that any of the alleged infringing sheets were made, worked, printed or copied by defendant since

July 17, 1901; that the cause of action, if any, accrued by reason of the copying, printing or working and there is no competent evidence that this was within two years from July 17, 1901" (R., p. 155).

The motion was denied, and defendant excepted (R., p. 155).

The ruling is assigned as error by the thirty-fifth assignment (R., p. 180).

R. S. Section 4968 provided that "*No action shall be main-*" *tained* in any action of forfeiture or penalty under the copy-" right laws unless the same is commenced within two years " after the cause of action has arisen."

It was incumbent upon the plaintiff to prove that the cause of action arose within two years before the action was commenced.

The action was commenced not earlier than July 17, 1903, that being the date of the summons (R., p. 2).

The cause of action alleged in the Tenth clause of the complaint was that the defendant

" did work, copy, print, publish and sell thirty thousand and " one hundred copies of said copyrighted painting within the " jurisdiction of this court, in violation of said plaintiff's copy-" right and with full knowledge of plaintiff's claims there-" under" (see R., p. 4).

That allegation was denied by the answer (R., p. 6).

The offense consists, under the statute, § 4965, in engraving, etching, working, printing, copying, publishing or importing or "knowing the same to be so printed, published— or imported, shall sell or expose to sale." There was no evidence that the defendant either engraved, etched, worked, copied, printed, published or imported, except the erroneously admitted Judgment Roll in the Replevin action against the *Tobacco* Co. in which the complaint alleged that the *Lithographic* Co. had printed the sheets (see Sixth Point above). The fact that defendant made lithographs as a part of its business, or had facilities for making these (R., p. 143), did not, in view of the penal nature of the action, afford a legal presumption that it made *these* prints.

If the evidence derived from defendant's books (illegally received as we contend) show that defendant shipped to various persons sundry hangers and show cards styled

" Here's to Old English " or " Old English Curve Cut " there was no evidence that *those* were sold or sold *after* July 17, 1901, unless the allegation in plaintiff's complaint in the Replevin action against the *Tobacco* Co. that the alleged copies had been printed within one year prior to commencement of that action which was June 20th, 1902 (R., pp. 104 and 102) was such evidence. *There was no evidence that any of them were exposed for sale and none that they were published.* Whatever they were they may all have remained in their original wrappers. The 993 sent to Deuther & Co., at Buffalo for framing, and the 203 replevied in Tobacco Co.'s office were certainly neither sold nor offered for sale.

The history of the matter is substantially as follows : A Mr. Chapin (a salesman for the *Lithographic* Co.) submitted to Francis A. Wilson (*brand* clerk for the *Tobacco* Co.) a design for the picture, Exhibit G, in the "*early part of the year 1901*" (R., p. 64). The design submitted was a small wood engraving in a magazine (R., p. 66). The design was in black and white about eight inches by four (R., p. 67). It was suggested that the picture would make a good advertisement for a brand of tobacco then known as " Old English curve cut pipe tobacco " for which the Tobacco Co. had previously, for a year or more, used a lithographed poster (R., p. 67), and *the two designs resembled each other* (R., p. 67). Subsequently Mr. Chapin brought a water color painting made by Rumler, who had made the earlier picture. This was within a month after the first presentation, and, therefore, *still in the early part of 1901* (R., p. 68). Defendant's books fix the date of that Rumler sketch as December 19th, 1900 (R., p. 146). Afterwards another picture was found in Chicago and Mr. Wilson suggested buying that and Mr. Wilson planned to take a part of this later picture (R., pp. 70 and 71). Mr. Wilson then produced by the aid of an artist, Mr. Blue, a smaller or reduced picture from the Chicago picture (R., p. 71). When this happened does not appear, except defendant's books under date of December 19th, 1900, show payment to Blue for designs (R., p. 146). Having decided to use the picture thus made up, he decided to give an order to *his supply department* for copies (R., p. 72). He received copies of the design in 1902 (R., p. 72), but does not say *from whom.* He afterwards received in 1902, copies of Exhibit G but " only a few "

(R., p. 72). These he received from his supply department. A decision was made to order about 25,000 to 30,000 copies (R., p. 76). It appears that he made the decision but he did not give the order nor does it appear to whom the order was given (R., pp. 76–77), nor when, probably early in 1901. He had no recollection about deliveries to the Denther Mfg. Co. (of Buffalo) (R., p. 78). In respect to their making, he said : " I do not know that I gave an order to any manufacturer " (R., p. 79).

On June 27, 1901, Mr. Parker, counsel for the Tobacco Co., wrote to Mr. Schutze, manager of the Berlin Photographic Co., the trade name of the plaintiff, saying that an order had been given to the American Lithographic Co., that the latter company had never furnished them and they had never been distributed ; that none of them had been sent out, and that the use of them had been abandoned (R., pp. 80, 81). This indicates they had been *made* before June, 1901, because April 25, 1902, Mr. Parker wrote to plaintiff, saying that he had advised *his* company that it might circulate the picture, " and I apprehend that it will do so " (R., p. 73), and the circulation began May 10th (p. 146).

That was the act of Mr. Parker and the *Tobacco* Co., and perhaps affords the inference that on that date the pictures were on hand ready for use by the Tobacco Co. *when* the Tobacco Co. should wish to use them. It is not inconsistent with the stories of the making of the pictures and the sale, if any, before July 17, 1901.

The exact status of that letter is not clear. It was offered in evidence by the plaintiff and objected to by defendant (R., pp. 81, 82), but the court ruled that it could not be used as evidence of itself, that the Lithographic Co. " printed any of the pictures or furnished any of them to anybody or offered or exposed any of them for sale " (R., p. 82), but the court received it in evidence, but it was not read to the jury (R., p. 82). It formed the basis of a long cross-examination of Mr. Parker by plaintiff's counsel and by the court, which resulted in Mr. Parker saying that he thought the contents of the letter were true (R., pp. 84, 85, and see pp. 94, 95) ; but he also said that he had no recollection as to how the matter contained in the letter had reached him, and whether he had got the assurances from the Lithographic Co. by direct communication

with them, or whether it was brought to him through Mr. Wilson, or whether it was confirmed by the Lithographic Co. "I cannot say" (R., pp. 95, 96) and had "no recollection on that subject" (R., p. 96). According to his recollection there was a written agreement "either in the form of a formal agreement or a letter" (R., p. 96), but he had "no recollection of having seen any such letter or agreement" (R., p. 96), and he had a recollection "of having seen such a letter or paper, although I cannot at all state its contents or what it was," nor whether he saw it before it was executed or after (R., p. 97).

Mr. Percival S. Hill had got his information about a guarantee from Mr. Wilson (R., p. 114). Mr. Wilson had told him that there was such an indemnity (R., p. 115). He had no recollection of ever having seen it (R., p. 115) and he did not know whether the agreement was verbal or in writing (R., p. 116).

Mr. Wilson had refused to take the picture because it was marked copyrighted, and the matter was in abeyance for some time when Mr. Chapin came to him and said that counsel had advised that the picture could be used, and, if he would use them "we will stand for it." He went back and brought a writing covering that point. This Mr. Wilson said was signed by an officer of the Lithographic Company (R., p. 119). But no specific date was assigned for these transactions, and all of them may have occurred before July 17th, 1901. The nearest dates which Mr. Wilson could assign was (R., p. 122) that it was before January 23rd, 1902, "it all took place between July 1st, 1901, and July 1st, 1902, hence it may have been before July 17th, 1901."

Mr. Parker's letter to Mr. Schutze, the manager of plaintiff was dated June 27, 1901 (R., p. 80). That letter indicates that the making of the picture by somebody had been accomplished some time before its date, as the writer says:

"Several samples have been furnished us from time to "time, but our advertising department assures me that there "have not been any of these pictures put out by us in any "way whatsoever" (R., p. 81).

As to selling, there was no evidence as to when any were *sold* to the Tobacco Co. unless the entries in defendant's books showing alleged deliveries was such evidence.

Mr. Wilson did not know that any were paid for (R., p. 128).

Mr. Durham, cashier of the Tobacco Co., made out checks to the order of the Lithographic Co. during 1901 and 1902 "nearly every day" and sometimes "several times a day" (R., p. 126) but he did not know what they were for, nor whether they were for lithographic work. He did not sign the checks (R., p. 125). Mr. Hicks, the treasurer, knew nothing about the matter (R., p. 124).

Mr. Ettlinger, treasurer of defendant, testified (R., p. 143) that his company in "those years" printed posters "of the size and shape" of Exhibit G, but he did not identify Exhibit G as having been made by defendant.

Defendant's books showed sundry deliveries of hangers and show cards to sundry persons for account of the *Tobacco* Co. from May 10, 1902, to June 30, 1902 (R., p. 146 to 150). These items, or some of them, appear to have been posted in the ledger (R., p. 150 to 151). These hangers and show cards appear to have been charged at five cents each. Mr. Wilson said the price they were to pay was six and one-half or seven and one-half cents each, but he was not sure (R., p. 126). They are thirteen in number and aggregate $538.29.

The ledger showed sundry credits from May 10, 1902, to December 31st, same year. These credits are one hundred in number and aggregate $77,627.70. None of the dates or amounts correspond with the day-book entries. No inference can be drawn in a penal action that the credits paid the particular debits. Nor does it appear how the credits were made up, whether by cash or otherwise.

Balances were struck on June 30, 1902, showing $9,123.64 owing by Tobacco Co. to Lithographic Co.; on December 31, 1902, $1,260.05; on June 30, 1903, $13,362.31; on December 31, 1903, $16,947.45; on June 30, 1904, $872.27; on December 31, 1904, $71.57, in each case against the Tobacco Co. (R., p. 153 to 154).

NINTH POINT.

The matter of the alleged errors assigned by the Thirtieth and Thirty-first assignments of error are not argued.

The Thirtieth assignment alleges error on the ground that the plaintiff had no right to maintain the action because neither the painting nor its mount was inscribed with the notice prescribed by Section 4962 (fol. 840).

The Thirty-first assignment alleges error on the ground that plaintiff had no right to maintain the action because the painting was published, both by exhibition of it and by publication by photogravures, and that neither the painting nor its mount was inscribed with the statutory notice (fol. 841).

Each of these grounds, were the basis, in part, of defendant's motion to direct a verdict (fols. 715, 716).

As this court has ruled upon the questions arising under the Thirtieth and Thirty-first assignments of error in prior litigations adversely to the contention of plaintiff in error, we do not now discuss the same.

The judgment should be reversed and a new trial ordered.

WM. A. JENNER,
Of Counsel for plaintiff in error, defendant below.

Supreme Court, U. S.
FILED.
MAR 17 1911
JAMES H. MCKENNEY,

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 115.

AMERICAN LITHOGRAPHIC COMPANY,
Plaintiff in Error
(Defendant below),

vs.

EMIL WERCKMEISTER,
Defendant in Error
(Plaintiff below).

BRIEF FOR DEFENDANT IN ERROR.

ANTONIO KNAUTH,
Of Counsel for Defendant in Error.

[illegible] Press, New Brunswick, [illegible], N. J.

Supreme Court of the United States.

AMERICAN LITHOGRAPHIC COMPANY, Plaintiff in Error (Defendant below), AGAINST EMIL WERCKMEISTER, Defendant in Error (Plaintiff below).	No. 115. October Term, 1910.

BRIEF FOR DEFENDANT IN ERROR.

This is a writ of error obtained by the American Lithographic Company, the defendant below and plaintiff in error, to review a judgment in favor of Emil Werckmeister, entered on the verdict of a jury in a *qui tam* action, brought to recover the money penalties for violation of Section 4965, Revised Statutes, relating to copyrights, the plaintiff claiming one-half of these penalties for himself and one-half to the use of the United States. The statute then in force provided as follows:

> "Sec. 4965. If any person, after the recording of the title of any map, chart, dramatic or musical composition, print, cut, engraving, or photograph, or chromo, or of the description of any painting, drawing, statue, statuary, or model or design intended to be perfected and executed as a work of the fine arts as provided by this act, shall, within the term limited, contrary to the provisions of this act,

and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, engrave, etch, work, copy, print, publish, dramatize, translate or import, either in whole or in part, or by varying the main design, with intent to evade the law, or, knowing the same to be so printed, published, dramatized, translated, or imported, shall sell or expose to sale any copy of such map or other article, as aforesaid, he shall forfeit to the proprietor all the plates on which the same shall be copied and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession either printing, printed, copied, published, imported or exposed for sale; and in case of a painting, statue, or statuary, he shall forfeit ten dollars for every copy of the same in his possession, or by him sold or exposed for sale; Provided, however, that in case of any such infringement of the copyright of a photograph made from any object not a work of fine arts, the sum to be recovered in any action brought under the provisions of this section shall be not less than one hundred dollars, nor more than five thousand dollars, and: Provided, further, that in case of any such infringement of the copyright of a painting, drawing, statue, engraving, etching, print or model, or design for a work of the fine arts, or of a photograph of a work of the fine arts, the sum to be recovered in any action brought through the provisions of this section shall be not less than two hundred and fifty dollars, and not more than ten thousand dollars. One-half of all the foregoing penalties shall go to the proprietors of the copyright and the other half to the use of the United States."

The text of this section is that of the amendatory act of March 2, 1895 (53d Congress, 3rd Session, Chapter 194; 28 Statutes at Large, page 965).

The copyright in question has been repeatedly before the Courts in actions against the American Tobacco Company, and against the American Lith-

ographic Company and has been adjudicated by this Court to be valid.

Werckmeister against American Lithographic Company, 148 F. R., page 1022, affirmed upon opinion of Holt, Judge, in 142 F. R., 827.

Same against Same, 134 F. R., page 321.

American Lithographic Company against Werckmeister, 146 F. R., page 377.

American Tobacco Co. against Werckmeister, 207 U. S., page 284.

Werckmeister against American Tobacco Co., 207 U. S., page 375.

The judgment in the present case was rendered upon a second trial in the action, the first trial having likewise resulted in a verdict of $10,000 in favor of the plaintiff, and judgment therefor, which judgment was, however, reversed by the Circuit Court of Appeals, for the following reasons, expressed in its opinion reported in American Lithographic Company against Werckmeister, 146 F. R., page 377, at page 378:

> "We are satisfied, however, that there was not sufficient evidence to warrant the jury in finding as they did, that the defendant had sold 1,000 copies or over to the American Tobacco Company. The representatives of both these corporations, and every individual officer and employee who was called to the stand claimed privilege under the fifth amendment to the Constitution. So far as any privilege personal to the witness was concerned, there was no merit in such contention. No claim was made that there had been any sale or purchase by him, but only by the corporation in whose employ he was. In some instances, the Court required the witness to answer, but as to most of the questions and as to the books and papers of both corporations, it sustained the objections. Apparently this was error. The Supreme Court has since

held that corporations are not under the protection of the fifth amendment (*Hale* vs. *Henkel*, U. S. Supreme Court, March 12, 1906, 26 Supreme Court, 370, 50 L. Ed., 652), but the result of such ruling has been to denude the case of sufficient positive evidence to sustain the verdict. It appears that over 1,000 copies of the picture were found in the possession of the Tobacco Company; that a design, the same as that of the copies, was submitted to one of the employees of the Tobacco Company, by the Lithographic Company, and approved by him; that dealings between the two companies are frequent, and checks are signed almost daily by the Tobacco Company for the Lithographic Company; and that all kinds of printing and lithographic supplies were got from the one company by the other, but although the very objections availed of are persuasive to the belief that the defendant made and sold all the copies which were found in the possession of the Tobacco Company, there is not in the record competent legal evidence to support such a finding."

Upon the second trial of the case, the same evidence was presented, and in addition thereto a great deal of cumulative evidence from employees of the American Tobacco Company as well, which purchased the infringing prints, as also from employees and the books of the defendant corporation. This evidence showed most conclusively the manufacture and sale of between twenty-five and thirty thousand copies of the picture in question by the defendant during the period stated in the complaint. As throughout the trial, all this evidence was strenuously objected to and the same constitutional questions theretofore raised have been again raised, and are insisted on in the writ of error, and it is also claimed that there was no evidence to sustain the verdict, a short review of the evidence and of the proceedings at the trial will be useful.

The Trial.

The proofs with reference to the obtaining of a copyright on the picture "Chorus" by plaintiff, the production of the painting by the artist, W. D. Sadler, the assignment of the right to obtain a copyright thereon in the United States, and the exhibition of the original picture at the Royal Academy in London, were the same as in the actions heretofore before this Court, making further comment thereon unnecessary. The plaintiff proved the manufacture of the infringing posters by the defendant company between the first day of July, 1901, and the first day of July, 1902, by the witness L. H. Schutze and officers and employees of the defendant company and the American Tobacco Company, and by the books of the American Lithographic Company produced under subpœna *duces tecum*. This evidence showed in substance that in December, 1900, Chapin, a salesman of the American Lithographic Company, whose business it was to obtain orders for lithographic work, called upon plaintiff's manager asking whether the Berlin Photographic Company would authorize the American Lithographic Company to use the copyrighted picture "Chorus" for an advertising "poster." He offered $100 in payment of such permission, but stated at the same time that his company would issue the poster any way, whether the permission was granted or not. The Berlin Photographic Company refused to give such permission (Record, pp. 28, 34, 118-119, 122, 141). Chapin had many interviews with the witness Francis A. Wilson, who was then in charge of the "Curve Cut Pipe Tobacco Department" in the business of the American Tobacco Company, and after submitting samples of copies of the painting "Chorus" to him, which were rejected on account of their unsatisfactory quality, succeeded in obtaining from the American Tobacco Company an order for about thirty thousand copies of the

picture to be used as posters for advertising purposes, the inscription "Old English Curve Cut Pipe Tobacco" being printed on these copies to make them available for such advertisements (R., pp. 63–72, 76). Schutze, who had been told by Chapin that the picture was to be used for the American Tobacco Company, called upon that company's legal adviser, Mr. Parker, for the purpose of protecting his interests, and the Tobacco Company, through Parker, first wrote him a letter saying that they had rejected the copy of the picture offered to them, and that they would not thereafter take up the matter again without notifying the Berlin Photographic Company. This they thereafter did, again through Parker, after a subsequent copy had been approved by the Tobacco Company. Chapin assured Wilson that the matter had been submitted to the counsel of the Lithographic Company, who had advised that company that the picture could be used, and that the Lithographic Company would, therefore, be willing to assume full responsibility for the use of these posters in the face of the copyright claim which was made by Schutze, and of which the Tobacco Company and the Lithographic Company had full notice. A guarantee agreement to that effect was signed by Donaldson, the vice-president of the American Lithographic Company on behalf of his Company, but this agreement was not produced, and practically all the papers and documents relating to the transaction have either been destroyed or lost, and were not produced at the trial, thus requiring very circumstantial evidence to prove their contents. About the fact of the guarantee there can be no question, as it was eventually testified to by Parker (R., pp. 80–86, 94–96, 97, 98–99, 101), and by Wilson with great particularity, and no denial hasbeen made (R., pp. 67–69, 71–74, 118–120, 121).

It also appeared that the American Lithographic Company had actually assumed the defense of an action which was commenced by the plaintiff against the American Tobacco Company for in-

fringement, on account of the publication of these posters, the vice-president of the plaintiff in error saying in his letter to the Tobacco Co.: "It is understood that our counsel is to appear for your company in this matter as well as for ourselves and without any claim for compensation from you" (R., pp. 100–101). The judgment record in the suit against the Tobacco Co., to which this letter referred, was offered in evidence (Exhibit P., R., pp. 102–109), and is the same upon which this Court has determined the validity of the copyright in the decision reported in *Am. Tob. Co.* vs. *Werckmeister*, 207 U. S., 284.

The trial commenced on November 2 and ended November 9, 1906 (R., p. 8), progress being delayed by much argument, objections and a most stubborn persistency in the refusals of the officers and employees of the two companies to testify to the facts in controversy or to produce the documents or papers which would have a bearing upon it. Subpœnæ *duces tecum* served upon those officers of the Lithographic Company who were within the jurisdiction were disobeyed, or the witnesses upon whom they were served pretended not to have the custody of the books or papers in question, or to be unable to appear in Court, and when the books were finally produced defendant's secretary refused to deliver them to the Court or to testify with reference to them, all under the objections and advice of defendant's counsel, grounded upon the alleged constitutional rights of the witnesses and the defendant company, and the lack of power to compel the production of the documents. In addition to this, it appeared that the vouchers for the sale of this large number of infringing pictures, the receipted bills which passed between the two companies, had been destroyed or were not any more in the company's possession for some unexplained reason; that the checks and stubs of the check books had been destroyed (R., pp. 47–54, inclusive);

that the order books and record books kept in the supply department of the American Tobacco Company which would show the orders for the posters, and the dates and quantities received, could not be found (R., pp. 124-126). It did appear, however, that more than 1,000 copies of the picture were found in the possession of the American Tobacco Company, and in that of Deuther Manufacturing Company, a customer of that company, the same being seized by the Marshal of this court under writs in the nature of replevin, also that the Tobacco Company received about 25,000 of these copies, and finally, after a laborious proceeding and examination, it appeared that they were all sold and delivered to the American Tobacco Company by the defendant during the period stated in the complaint, and paid for by the American Tobacco Company, either at that time or thereafter, by making regular payments in a current account. This appeared from an inspection of the day book of the defendant, which was produced by defendant's secretary, Charles Eddy, under subpœna *duces tecum*, and which contained all the entries of these sales, the picture being described either by the name "Old English Curve Cut" or the name "Here's to Old English" (R, pp. 126-128, 129-131, 145-154). After the first entry on December 19, 1900, of the payment for the first sketch, by Rumler (which was rejected), the entries of the sales commence on May 10, 1902, and show, in that month alone, the sale and delivery of 11,600 posters in question by the defendant to the American Tobacco Co., several thousand being sent to the Deuther Manufacturing Co., where the Marshal, in June, 1902, replevined more than 900 copies. During June, 1902, about 1,810 copies are shown to have been sold and delivered to the Tobacco Co., many being "delivered to Mr. Wilson," who testified in the case. They were all paid for, as the books showed.

Charles Eddy, secretary of the defendant, appeared under a subpœna *duces tecum*, to which

objection was made by counsel for the defendant on the ground that it had not been served in accordance with the provisions of the Code of Civil Procedure in the State of New York as to time of service, nor upon the President or other head of the corporation, or the officer thereof in whose custody the book or papers was said to be. The subpœna which was offered in evidence was directed to Robert M. Donaldson, Charles Eddy and Louis Ettlinger, Donaldson being the vice president and Ettlinger the treasurer of the defendant. Knapp, the President, was out of the jurisdiction. It required them specifically to bring all books and papers relating to the poster in question and to its manufacture and sale between July 1, 1901, and July 1, 1903, in their custody or power. Eddy, as secretary of the company, was in possession of the minutes of the Board of Directors, but did not bring them. Eddy conferred with Ettlinger, the treasurer, and Donaldson, the vice-president, about the subpœna which had been served upon him. He testified that the books of account were in charge of the auditor-C. E. Walker, but that he did not know who kept the ledger and business books. A notice to produce the letters and vouchers relating to the transactions between the two companies had been served, but they were not produced. Eddy testified that he did not know who had the current business books that were in use in 1901. Eddy himself was a member of the Executive Committee, Knapp, Ettlinger, Donaldson, Harris, Buek being the other members. Eddy was also a director (R., pp. 28-41) Donaldson, the Vice-President, could not be found, remaining out of town during the entire time. Ettlinger, the Treasurer of the Company, had also been subpœnaed by the same subpœna *duces tecum*, but did not bring any books until defendant's counsel had exhausted every effort to keep them out of this case. Plaintiff moved that the defendant be required to produce all the books and papers relating to the sale of the poster between July 1, 1901, and

July 1, 1903, on the following day, whereupon the Court directed the defendant to produce them at the opening of court on the following day, referring expressly to the subpœna which had been served upon a member of the Executive Committee (R., pp. 42, 46–47). Defendant's counsel claimed that the subpœna which had been served was nugatory, and objected under Sec. 724 of the Revised Statutes that the production of the books could not be enforced. Considerable discussion followed between the Court and the defendant's counsel, the Court referring repeatedly to the subpœna served upon the Secretary of the Company (R., pp. 46, 57), to the witness' apparent unwillingness to testify, or lack of memory, saying, "now he can produce the book that he does have custody of; that is all he has control of. That is all the power of the Court, what the Court can do in that regard." He referred to the previous opinion of the Circuit Court of Appeals in this case, and finally directed the witness to be in court again with the book of minutes which he had charge of (R., p. 47).

James Fletcher, Jr., the comptroller of the American Tobacco Company, testified that he had been likewise served with subpœna *duces tecum*, but could find nothing on the subject; that the books were not in existence, that he could find nothing, that the memorandum books had been destroyed and the checks and stubs had also been destroyed about a year before the trial, which showed that they were destroyed after the actions against the American Tobacco Company and the American Lithographic Company were commenced (R., p. 49). He further testified that there had been a cash book showing the items of payment, but that all the vouchers for the transactions inquired about had disappeared or were destroyed. He says that unimportant papers were continually destroyed, but that vouchers would not be considered unimportant, but as important papers. The trial being resumed on Wednesday, November 7th, 1906, the

Court admonished the jury not to pay any attention to the legal argument between counsel and the Court and called for the subpœna *duces tecum* (R., p. 57) and this having been noted, the Court directed the witness Eddy, who had appeared, to take the stand again. The Court then ruled that it was the duty of the witness whether as secretary of the company or as an officer of it, or a member of its executive committee, to produce every book and paper of the description called for in the subpœna. The examination was then resumed, whereupon the witness produced the minute book of the Board of Directors of the defendant. Defendant's counsel thereupon objected to having the book marked for identification, and to have it given to the Court, and instructed the witness not to hand it to the Court. These instructions to the witness having been repeated, the witness declined to pass the book to the Court, whereupon the Court declared the witness guilty of open contempt of court, and directed an order to be drafted for his commitment.

With reference to the order made orally by the Court on Monday, the 5th of November, directing the defendant to produce books and papers, the defendant declined to produce the books and papers on the ground that the Court was without authority to make the order, and plaintiff's counsel declined to insist on it or take advantage of it in any manner, but proceeded with the case and the taking of testimony (R., p. 63). The examination of Wilson was then resumed, who, after many objections by defendant's counsel on the ground of the witness' alleged constitutional privileges, testified fully to the dealings between his company, the Tobacco Company, with the defendant. Thereafter the witness Eddy produced and handed to the Court the minute book and was discharged from the marshal's custody. A letter written by Robert M. Donaldson, the vice-president of the American Lithographic Company, addressed to Junius Parker

of the Tobacco Company, was offered showing the existence of a guaranty from the Lithographic Company to the Tobacco Company concerning the use of the posters (R., p. 100), and the fact of that guaranty and the defense of Werckmeister's suits against the American Tobacco Co. (an equity suit for injunction, and a suit at law for the recovery of the infringing pictures) by the plaintiff in error were further shown by Parker's letter to Donaldson (R., p. 140) and the testimony of Ettlinger, the treasurer, and Eddy, the secretary of the plaintiff in error (R., pp. 140-141; 28, 57, 77, 85, 129). Further corroboration thereof was furnished by the record of the so-called replevin suit, Exhibit P, which was defended by the counsel of plaintiff in error, and by the testimony of Junius Parker, who fully disclosed the fact that the plaintiff in error had in fact assumed and carried on the defense of the actions against the Tobacco Co. (R., pp. 80-85, 85-100).

Thereafter the bill of complaint, answer and decree in an equity suit against the American Lithographic Company and American Tobacco Company were offered in evidence, but motion being thereafter made to strike out the answer and the decree under Sec. 860 of the Revised Statutes, the motion was not opposed by plaintiff's counsel and granted by the Court, thus removing these exhibits from the case.

William H. Schroder, auditor of the American Tobacco Company, testified that as auditor all vouchers and books of account were in his possession; that the vouchers of 1902 were destroyed, and that he did not know where the order books mentioned by the witness Wilson were (R., pp. 123-124). John M. W. Hicks, treasurer of the American Tobacco Company, testified that he had not made any search for the papers required by the subpœna, because they should be in charge of James Fletcher, Jr., who was then auditor (R., pp. 124-125), but James Fletcher, Jr., had previously testified that everything had been destroyed

about a year ago (after the commencement of this action) (R., pp. 47–49). This action was commenced July 17, 1903 (R., p. 151).

Thereafter Charles Eddy was recalled; he testified that he did not find any entries in the ledger relating to the picture in question, that elsewhere he did find some entries of transactions with the American Lithographic Company, but had not brought the book with him; that he had made no effort to have any books or papers produced as required by the subpœna (R., pp. 129–134). Plaintiff's counsel asked the Court to direct the witness to make a further search for the books and papers specified in the subpœna, stating that the treasurer of the defendant had also been subpœnaed, but had excused himself by reason of an operation which was to be performed upon him, and that he had been unable to subpœna the vice-president of the company. The witness Eddy testified that he did not know where the president of the company was. It also appeared that Donaldson, the vice-president, was out of town and could not be found (R., pp. 133–134).

On the following day the examination of witnesses having been resumed, defendant's treasurer, Louis Ettlinger, was examined, and testified that he could find out who was in charge of defendant's art department in the year 1901–1902, from the books which were in his possesiion and in Court; that daily sales and deliveries of lithographic matter were regularly entered in the day book, which was thereupon produced (R., pp. 140–144).

Eddy, who was then recalled, testified that he had the day book then in his custody, presented it, and testified from it, showing the delivery of more than twelve thousand of the infringing pictures by the plaintiff in error to the American Tobacco Company with the dates and quantities, all within the period mentioned in the statute, and the ultimate payment of the account of the American Tobacco Company therefor (R., pp. 144–154). Under the statute, proof of the sale of 1,000 copies was sufficient to support the verdict.

ARGUMENT.

Point I.

The first, second, third and fourth assignments of error are founded upon the contention that the action being a penal action, the questions asked of the witness, Charles Eddy, were inadmissible in view of Sections 724 and 860 of the Revised Statutes, and the fourth, fifth and fourteenth amendments to the Constitution of the United States.

The same objections had been made upon the previous trial of this action and were overruled, and this was sustained by the Circuit Court of Appeals upon its previous decision (146 F. R., 377) upon the ground that no claim was made that there had been any sale or purchase by the witnesses in question, but only by the corporation in whose employ they were. That seems a sufficient answer now.

Brown vs. *Walker*, 161 U. S., 591, 597.

Point II.

THE FIFTH ASSIGNMENT OF ERROR: The objection that the subpœna *duces tecum* had not been served five days before the trial and was therefore invalid under the provisions of the Code of Procedure of New York, was not a valid objection.

There was no substance in the objection, because the Federal Courts follow their own rules and practice of procedure with reference to the issuing and enforcement of subpœnas. The Statutes of the United States contain numerous provisions with reference to compelling witnesses to attend Court and testify, produce books and other matters, and have developed a practice which is quite different from that of the State Courts.

U. S. Revised Statutes, Sections 876, 877, 878, 879, 848, 4074, 724 and 869.

The entire subject of evidence and the examination of witnesses is so far legislated upon by the Federal Statutes that the practice in the State Courts is not applicable to that subject.

Easton vs. *Hodges*, 7 Bissell, 324; 8 Federal Cases, No. 4258.

Henning vs. *Boyle*, 112 F. R., 397.

Point III.

THE SIXTH ASSIGNMENT OF ERROR claims that the Court erred in adjudging the witness Eddy to be guilty of open contempt of Court, because the witness refused to hand over the minute book of the defendant corporation to the Court, the objection being based upon the witness's alleged privilege under Section 724, Revised Statutes.

The production of the minute book and other books of the defendant corporation was not sought by an application to the Court by motion under Section 724 Revised Statutes, entitling the plaintiff to a judgment by default in case of non compliance with the order, but by subpœna *duces tecum*. If the Court during the proceedings at the trial made an order which might be construed as being made under the supposed authority of that section, that order was not taken advantage of in the manner pointed out in that Section, and all reference to it is therefore unimportant, as it was without any influence upon the outcome of the trial. The plaintiff had subpœnaed the Secretary and the Treasurer of the defendant corporation, being unable to find and serve the Vice-President or the President. The Secretary upon being served with the subpœna, conferred with the Treasurer and the Vice-President about it and undoubtedly could have produced all the business books of the defendant, because the Treasurer, who was likewise subpœnaed, but kept away from the trial for several days, had

those books in his custody and finally produced them. The obstructions put in the way by defendant's officers by keeping away from the trial and refusing the production of defendant's books, came near causing a mistrial for the second time, but the plaintiff's rights under the subpœna *duces tecum* were sternly enforced by the court, finally resulting in a complete disclosure of the defendant's premeditated infringement upon the plaintiff's copyright under advice of counsel that it could safely do so, and for the purpose of securing business from the American Tobacco Company. The Court below, in its opinion (R., pp. 184–185), said "a perusal of the record satisfies us that nothing short of a threat of immediate commitment would have secured obedience to the process of the Court," and held that Section 716, U. S. Revised Statutes, and the innate power of the Court were sufficient to enforce the subpœna.

This is so fundamental and elementary that we need not add anything to the remarks of the Circuit Court of Appeals in its opinion below.

See

Besette vs. *W. B. Conkey Co.*, 194 U. S., 324, 326.

Point IV.

AS TO THE SEVENTH TO TWENTY-SECOND (INCLUSIVE) ASSIGNMENTS OF ERROR.

The Constitutional questions have been decided against the plaintiff in error.

That a proceeding by a writ in the nature of a writ of replevin to obtain the infringing articles in the defendant's possession and the production of such articles in Court as proof on the trial do not violate the defendant's rights, if a corporation, under the fourth and fifth amendments has been

established by this Court in the litigation against the Tobacco Company.

American Tobacco Co. against Werckmeister, 207 U. S., 284, on page 302.

In that case all the questions were raised which are raised in the present case against the production of the defendant's business books and substantially all the arguments which were then made in opposition to the offer in evidence of the writ of replevin, the return thereto and the documents and articles brought into Court upon that writ, in the nature of a writ of replevin, are repeated in opposition to the offer in evidence of the entries from defendant's books.

We submit that since the decisions in the cases of:

Hale vs. *Henkel*, 201 U. S., 43.
McAlister vs *Henkel*, 201 U. S., 90.
Nelson vs. *United States*, 201 U. S., 92.
Alexander vs. *United States*, 201 U. S., 117.

all the points made by plaintiff in error in this connection must be considered as disposed of against its contention.

The case of *Nelson* vs. *U. S.*, above cited, discussed also the contention made that the books called for were not in the possession or custody of the witness, who was secretary of the corporation, the Court saying:

> "This contention is untenable. The ground of it is that the possession of the witnesses was not personal, but was that of the respective corporations of which they were officers. Granting this to be so, and that the witnesses could have set up whatever privileges the corporations had, nevertheless they had the custody (actual possession) of the books and were summoned from necessity as representing the corporations. It is hardly necessary to observe that the witnesses had all the possession human beings could have had or can have, and if the objection is to prevail the

books of a corporation can be withdrawn from the reach of compulsory process" (p. 115).

On this point see also,

Amcy vs. *Long*, 1 Camp., 17.

Crowther vs. *Appleby*, L. R., 9 C. P., 23, 27.

Johnson Steel Street-Rail Company vs. *North Branch Steel Company*, 48 F. R., 195.

In the case of *American Banana Co.* vs. *United Fruit Company*, 153 F. R., 943 (C C., Eastern District of New York, Lacombe, *C. J.*), it was held that there was no substantial difference whether the books and papers are called for under a subpœna *ad respondendum* or under Section 724, nor whether the charge is presented in an action brought by the State of its own motion or on the relation of some one, or by a private person to whom the State has promised the fine it has prescribed as punishment of the offense, in the event that such person shall succeed in proving the commission of that offense, but that the decision of this Court in *Hale* vs. *Henkel*, 201 U. S., 43, compelled the corporation to produce the books in that case.

The same conclusion concerning the general application of this Court's ruling in the case of *Hale* vs. *Henkel* was drawn by Holland, *D. J.*, in the decision of *International Coal Mining Company* vs. *Pennsylvania Railroad Company*, 152 F. R., 557, 559, and is generally accepted doctrine.

See

N. Y. Central & H. R. R. Co. vs. *U. S.*, 165 F. R., 833, 843 (C. C. A., First Circuit).

In re American Sugar Refining Co., 178 F. R., 109.

London vs. *Everett H. Dunbar Co.*, 179 F. R., 506 (C. C. A., 1st Ct.).

N. Y. Central Co. vs. *U. S.*, 165 F. R., 833, on p. 843.

Point V.

Neither was there any substance in the contention of the plaintiff in error that the witness, being a stockholder of the defendant company, would suffer some pecuniary loss by the action. It has been long well settled that pecuniary loss to the witness was not one of the penalties or forfeiture intended to be protected against by the Constitution.

Bull vs. *Loveland*, 10 Pick., 9.
1 Greenleaf on Evidence, 15th Ed., paragraph 452.
Lowney vs. *Perham*, 20 Maine, 240.
Ward vs. *Sharp*, 15 Vermont, 115.

The decisions of this Court, cited from Vol. 201 of its reports, also fully cover this point.

Point VI.

It being now established that a corporation cannot claim the benefits of the fifth amendment, it seems to follow as a necessary consequence that it cannot insist upon any statutory rights granted by Section 860 of the Revised Statutes, which was designed in the spirit of the Constitutional amendment and evidently had the same object in view.

Tucker vs. *U. S.*, 151 U. S., 164.

If this statute should be held to secure rights to corporations which the Constitution does not provide for, then a result would be produced totally different from that of the decisions of this Court in the cases above cited. The phraseology of that statute clearly excludes its applicability to testimony taken in the action itself in the usual manner, either with or without the assistance of written en

tries in books. The words employed in the Statute show an intention to prevent the offering in evidence, or other use made at the trial, of declarations made or proceedings had in some previous litigation or upon some previous occasion. The occasion for its passage was described by Judge Putnam, speaking for the Circuit Court of Appeals, First Circuit, in the case of *Alkon* vs. *U. S*,. 163 F. R., 810, 815, as follows:

> " Prior to this statute the authorities were in some confusion on the point whether what was testified to by a person summoned to give evidence without anything being said by the Court or by the witness with reference to his Constitutional protection against incrimination could be used against him on a subsequent criminal proceeding." * * *
> " Consequently this statute was needed and as it is remedial in its character, it is entitled to all the effect which its letter fairly calls for."

The case in which this decision was made was a prosecution for conspiracy and a previous deposition of the defendant was offered and the defendant interrogated about it in that proceeding against his objection.

In the case of *Hammond Lumber Company* vs. *Sailors' Union*, 167 F. R., 809 (C. C. Northern District of California), the facts show (on page 812) that a deposition of the respondent was offered in evidence which had been theretofore taken in another case under subpœna; and it is also said that it was on this evidence that the petitioner chiefly relied to connect the defendant with the specific acts charged.

In the case of *Johnson* vs. *U. S.*, 163 F. R., 30 (C. C. A., First Circuit), Holmes, *C. J.*, speaking for the Court, held that a bankrupt's schedules were protected by Section 860 Revised Statutes and could not be used as evidence against him in a proceeding

to punish him for concealing property belonging to the estate, saying, page 32:

> "Its object seems to us clear. We think that object was to prevent the required steps of the written procedure in Court preliminary to trial from being used against the party for whom they were filed."

This case was followed in

Cohen vs. *U. S.*, 170 F. R., 715,

by the Circuit Court of Appeals in the Fourth Circuit.

That the statute must be understood to have reference only to matters which preceded the proceedings at the trial appears plainly from its phraseology. It will certainly not be denied that admissions contained in an answer to a complaint like that in the present case, limit and define the issues which are to be tried in the action, which like every other civil action is to be tried upon the issues made by the pleadings.

U. S. vs. *Zucker*, 161 U. S., 475, 481.
Fish, qui tam, vs. *Manning*, 31 F. R., 340.
U. S. vs. *Shapleigh*, 54 F. R., 126, 133.
Webster vs. *People*, 14 Ill., 375
Town of Havana vs. *Biggs*, 58 Ill., 483.
Roberge vs. *Burnham*, 124 Mass., 277.
Hitchcock vs. *Munger*, 15 N. H., 97.
People vs. *Briggs*, 47 Hun, 266; affi'd 114 N. Y., 56.

Such admissions have the same force and effect as admissions of fact made in open court at the trial, and no reason can be advanced why such admissions should not be accepted by the Court in place of proof of the facts admitted. And yet, by a literal reading of the statute, such use of such admissions would be forbidden by the words of the Statute: "No

pleading of a party * * * shall be given in evidence or in any manner used against him."

Evidence obtained from a witness by examination at the trial under subpœna is not comprised within the ordinary meaning of the words "discovery or evidence obtained from a party or witness" in connection with the words "shall be given in evidence or in any manner used against him." Such evidence is not given in evidence, nor is it used against him, but the trial of the case consists in the very taking of such evidence, and unless the witness or party should be excused by constitutional provisions from furnishing it, no reason would exist why a statute should so excuse him.

Point VII.

The 23rd assignment of error is based upon the objection that the judgment roll in the action of the defendant in error against the American Tobacco Company was incompetent, irrelevant and immaterial.

We submit that it was not, as stated in the opinion of the Court below (Rec., p. 185), incompetent as being *res inter alios acta*. The American Lithographic Company having induced the Tobacco Company to place with it an order for copies of the picture in question, had assumed all responsibility for the consequences; it had guaranteed the Tobacco Company against loss in the transaction; promised to defend that company in any action which might be brought for infringement, and actually did defend it by its own attorney and counsel. It was pecuniarily interested in the outcome of the litigation and must have borne the entire cost of it, because its guarantee required it to do so. It was the *dominus litis* contesting the validity of the copyright, with full opportunity to bring into Court the evidence of all defenses known to it.

These facts bring the matter within the well settled rule that all matters adjudicated in such a litigation are *res judicata* against the party who stood behind the party on the record as sponsor and surety, defending the action.

Cromwell vs. *County of Sac*, 94 U. S., 351.

Fayerweather vs. *Ritch*, 195 U. S., 276.

Lovejoy vs. *Murray*, 3 Wallace, 1, 19.

Robbins vs. *Chicago City*, 4 Wallace, 657.

Eagle Mfg. Co. vs. *David Bradley Mfg. Co.*, 50 F. R., 193; 57 F. R., 980, 990.

Sacks vs. *Kupferle*, 127 F. R., 569.

Empire State Nail Co. vs. *American Co.*, 74 F. R., 864.

Andrews vs. *Thum*, 64 F. R., 149.

Bates Refrigerator Co. vs. *Gillett*, 30 F. R., 687.

Malloy vs. *Dunden*, 57 U. S. Appeals, 161.

Penfield vs. *Potts*, 126 F. R., 475, 480.

National Folding Box Co. vs. *Dayton*, 95 F. R., 991.

Jefferson vs. *Westinghouse*, 139 F. R., 385.

The judgment in that litigation (which has been finally affirmed by this Court in the decision above referred to, 207 U. S., 284) was competent and conclusive evidence between the parties to this case of the validity of the copyright, the plaintiff's title thereto and of all the matters found by that judgment.

Point VIII.

The 24th, 26th and 27th assignments of error are based upon the offer in evidence of a bill in equity in a suit of the defendant in error against the

American Tobacco Company and the American Lithographic Company, and the answer of the American Tobacco Company in said suit. The record of that suit was withdrawn from the case, when the attention of plaintiff's counsel was called to a stipulation produced by defendant's counsel, and thereafter no reference to it whatever was made in the case, either in the charge of the Court or in the argument of counsel. If the answer of the Tobacco Company was left in the case (it is not printed in the record) it was merely due to an oversight, and because defendant's counsel made no motion to strike it out, when he moved to strike out the decree and answer of the Lithographic Company in the equity case.

> "Mere technical errors in the Circuit Court not injuriously affecting the rights of the parties do not present sufficient grounds for reversing the judgment in the Supreme Court."
>
> *The Wanata*, 95 U. S., 600.

> "No judgment should be reversed in a court of error when it is clear that the error could not have prejudiced and did not prejudice the rights of the party against whom the ruling of the Court was made."
>
> *Lancaster* vs. *Collins*, 115 U. S., 222, 227.
>
> *Decatur Bank* vs. *St. Louis Bank*, 21 Wall., 294.
>
> *Ogdensburg R. R. Co.* vs. *Pratt*, 22 Wall., 123.
>
> *McLemore* vs. *Louisiana State Bank*, 91 U. S., 28.
>
> *Mobile R. R. Co.* vs. *Jurey*, 111 U. S., 593.
>
> *West* vs. *Camden*, 135 U. S., 507.
>
> *Runkle* vs. *Burnham*, 153 U. S., 224.
>
> *Lazarus* vs. *Phelps*, 156 U. S., 202.

"The withdrawal of evidence which was improperly admitted is no ground of error."
Specht vs. *Howard*, 16 Wall., 564.
Hopt vs. *Utah*, 120 U. S., 439.
Waldron vs. *Waldron*, 156 U. S., 383.

Point IX.

The judgment below should be affirmed, with costs.

Respectfully submitted,

ANTONIO KNAUTH,
Of Counsel for Defendant in Error.

Supreme Court, U. S.
FILED
APR 5 1911
JAMES H. MCKENNEY

Supreme Court of the United States.

October Term, 1910.

No. 115.

AMERICAN LITHOGRAPHIC COMPANY,
Plaintiff in Error
(Defendant below),

vs.

EMIL WERCKMEISTER,
Defendant in Error
(Plaintiff below).

Additional Brief for Defendant in Error.

ANTONIO KNAUTH,
Of Counsel for Defendant in Error.

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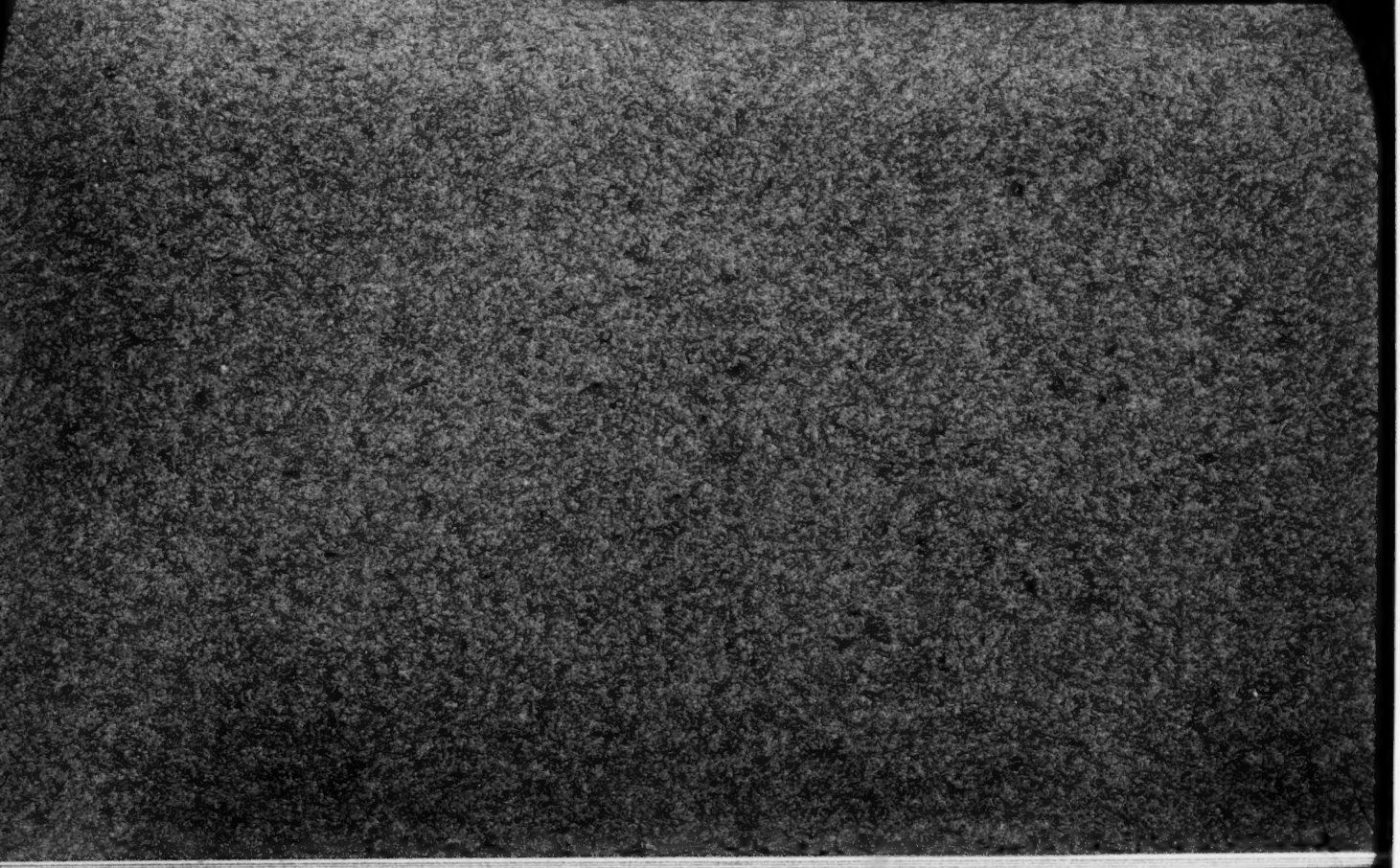

Supreme Court of the United States.

AMERICAN LITHOGRAPHIC COMPANY, Plaintiff in Error (Defendant below), vs. EMIL WERCKMEISTER, Defendant in Error (Plaintiff below).	No. 115. October Term, 1910.

ADDITIONAL BRIEF FOR DEFENDANT IN ERROR.

The brief for defendant in error having been made without an opportunity to examine the brief of the plaintiff in error, we now respectfully submit the following additional points in reply to the same.

POINT X.

The contempt of the witness Eddy, discussed on pages 10 to 11 of the brief for plaintiff in error, had no relation to the business books afterwards produced by the plaintiff. It related to the book of minutes of directors' meetings and was based on the refusal of the witness to hand that book to the court for examination.

That was clearly an unauthorized and unlawful resistance, because the court could only determine

after examination of the book whether it contained anything that might properly be objected to. The record does not show any justification for the statement on the brief for plaintiff in error (on p. 11) that counsel feared that "it was the purpose of the court to hand the (minute) book to plaintiff's counsel to be examined by him."

The action of the court in putting the witness in contempt was legal and proper and cannot be made the basis of any complaint, objection or exception with reference to any subsequent proceedings at the trial.

Nelson v. *U. S.*, 201 U. S., 92.
U. S. v. *Babcock*, 3 Dill., 566; Fed. cases, No. 14,484.
Bischoffsheim v. *Brown*, 29 Fed. Rep., 341, 343.
Mitchell's Case, *12 Abbott's Practice* (N. Y.), 249.
Doe v. *Clifford*, 2 Carrington & K., 448, *In re* O'Toole, 1 Tuck., 39.

POINT XI.

Section 860, R. S., is not available to plaintiff in error as a defence.

The objection to the production of the business books (R., p. 144) did not refer to section 860, R. S., but was based on section 724 and the 4th, 5th and 14th amendments to the Constitution; nor did the subsequent colloquy (R., pp. 145 to 146) import that section 860 into the objection which was made to the production of these books. The objection under that section was one which could be

waived, and it was waived because the objection was not taken.

Pierce v. *Somerset Railway*, 171 U. S., 641, 648.
Lee v. *Tillotson*, 24 Wendell, 337.

In the latter case it was said:

> "A party may waive a constitutional as well as a statute provision made for his own benefit. The contrary argument would deprive a criminal of the power to plead guilty, on the ground that the constitution has secured him a trial by jury."

Equal protection of the rights of both parties demands that the interests of the appellee, who must be taken to have relied upon the absence of such objection and to have refrained from bringing other evidence for that insufficiently objected to, must not be sacrificed at the request of the appellant who might have made, but did not make, the objection.

> *"When particular grounds of objection are specified, such specification is exclusive, and all grounds not specified are waived."*
> *Hamilton* vs. *Southern Nevada Mining Co.*, 33 F. R., 562, 568.
> *Evanston* vs. *Gunn*, 99 U. S., 660, 665.
> *Belk* vs. *Meagher*, 104 U. S., 279, 289.

The objection to the testimony from the business books was made when the witness Eddy was recalled as a witness by plaintiff's counsel. The several other specific objections made during the time of that second examination precluded the idea that it was the understanding of counsel for the defendant below, that his general objection made on the first examination of Eddy was still standing as an objection to anything which might be asked of that witness upon any occasion whatever. When

Eddy was recalled as a witness (R., p. 129) no statement was made by defendant's attorney that any objections made on his previous examination were repeated without being mentionad in any way, and when the production of the business books was insisted on, defendant's counsel made a carefully framed and specific objection which was to apply generally to the production of these books. That objection (R., p. 144) necessarily superseded the general objection made at the beginning of the first examination of the witness Eddy, because it so largely covered the matter of the first objection that it cannot have been the intention of its counsel to have both objections entered to each question. Section 860 was neither argued nor alluded to then, and cannot be fairly brought into that objection. We therefore submit that the contention of plaintiff in error that the production of the business books was made under duress from the court is not supported by the facts; that the several objections interposed to the testimony from the business books were untenable, and that any objection arising from section 860 R. S. was waived.

This must also have been the understanding of the court below, as the opinion of the Circuit Court of Appeals does not allude to section 860 at all, but treats only of the objections as shown by the Record and argued in that court.

POINT XII.

The lawful exercise of the subpœna duces tecum cannot be successfully questioned.

There is no doubt that as a witness, a party can be compelled by a subpœna *duces tecum* to produce books, documents and papers in his possession in

the same manner as any other witness, in an action at law, as well as in suits of equity.

Merchants' National Bank v. *State National Bank*, 3 Clifford, 201; Federal cases, 9448.

Bischoffsheim v. *Brown*, 29 Fed. Rep., 341, 343.

And the officers of a corporation may be required as witnesses to produce its books when the books are necessary evidence.

Wertheim v. *Continental Railway & Trust Company*, 15 Fed. Rep., 716.

Johnson Steel Railway Company v. *North Branch Steel Company*, 48 Fed. Rep., 191.

Edison Electric Light Company v. *United States Electric Light Company*, 44 Fed. Rep., 294; Same case, 45 Fed. Rep., 55.

Johnson Company v. *North Branch Company*, 48 Fed. Rep., 195.

It is complained in the brief for plaintiff in error that, in an action at law, proceedings for obtaining inspection of documents at the trial are regulated by section 724, and that subpœna *duces tecum* is not available, on the authority of *Gregory* v. *Chicago, M. & St. P. R. R. Co.*, 10 Fed. Rep., 529, and *Kirkpatrick* v. *Pope Mfg. Co.*, 61 Fed. Rep., 46. The cases cited, however, do not support the proposition. The first of them merely sustained a motion under sec. 724, holding that the practice in the State Courts was not governing in the Federal Court, while the second case held that the subpœna *duces tecum* would not be *adequate* under the circumstances of the case and sustained a motion under sec. 724.

The whole matter is so distinctly laid down and the practice on the trial of actions at law so clearly

and fully explained in the decision of Clifford, *C. J.* (with whom sat Lowell, *D. J.*), in the case of *Merchants' National Bank* vs. *State National Bank*, above cited, that it seems unnecessary to add anything to it.

A careful note on the matter is also found in the report of the case of *Wertheimer* vs. *Continental Railway & Trust Co.*, 15 Fed. Rep., 716.

There is a well known distinction between a proceeding to obtain an inspection and examination of books and documents belonging to an adverse party, and the examination of a witness, not that party, under a subpœna *duces tecum*. In the former case the party is directed to produce the evidence in its possession and open the same to an examination by the other party to the suit for the purpose of discovery. In the latter case a witness is examined who, for the purpose of refreshing his memory, in the theory of law, is made to refer to such documentary evidence in his possession, as, according to his testimony, contains the matter inquired about. It is not the books or documents themselves which are the evidence, but the evidence is that of the witness and merely a part of his testimony. If the section of the statute should be understood in such a broad sense, as is claimed for the plaintiff in error, the witness should not be allowed to testify at all, because all of his knowledge as an employe of the defendant corporation could only have been obtained from evidence in the possession of the corporation, or is so intimately connected therewith, as to make a separation impossible. A construction of the section which would allow the witness to testify, but would not allow him to refresh his memory from any documentary matter which may be sufficiently under his own control to produce it, because it is property of the defendant, would seem to be a constrained and unnatural construction and is not supported by any authorities.

POINT XIII.

The judgment below is fully sustained by the evidence, even though the entries in defendant's books be disregarded.

The evidence of the witnesses Francis A. Wilson, Ludwig A. Schutze, Junius Parker, Percival S. Hill and Otto von Schrenk, showed the making of a copy of the copyrighted picture by the defendant for the purpose of soliciting a large order of lithograph copies thereof from the American Tobacco Company, to be used by that Company as posters for advertising purposes, and that the picture was for that purpose provided with an inscription "Old English Curve Cut Pipe Tobacco" for which the Tobacco Company had a special department in charge of the witness Wilson. It showed that a large order, for about 30,000 copies thereof, was actually obtained from the Tobacco Company, and that the posters, of which a sample was identified and put in evidence, were actually delivered by the defendant to the Tobacco Company, several hundred of them being found in the possession of the Tobacco Company by replevin, while 993 were found in the possession of the Deuther Manufacturing Company, as framers of the pictures in pursuance to directions and under the control of the American Tobacco Company (see Stipulation, R., pp. 55, 56). Wilson testified to the price, which was agreed upon, to the time when they were received, that he approved the bills, that the Tobacco Company received many thousands of them, and that he did not know of any refusal to pay for them (R., pp. 126–129, incl.). Upon this evidence the jury were fully justified in finding a sale of the required number of copies within the two years in question, it being immaterial whether they were paid for or not. It must not be

overlooked that the Tobacco Company had destroyed all books, vouchers and correspondence relating to this transaction since the commencement of the action, and that, if the books of the defendant Company were not available as evidence, secondary evidence of the sale was the only evidence which could be furnished. It was also shown that the sale was made under a guaranty from the defendant to the American Tobacco Company, saving the latter harmless from any damage coming to it by reason of the infringement of the copyright, in defiance of which the manufacture and sale had been made, and that the Lithographic Company actually defended the suit against the Tobacco Company in which more than 1000 copies were found in the possession of that Company, which was the purchaser, according to the evidence. The case being a civil case, a mere preponderance of the evidence was sufficient, and no proof beyond a reasonable doubt as in a criminal case was required. The evidence so submitted would have justified a jury to find the act of sale in accordance with ordinary rules of evidence.

Dunbar vs. *U. S.*, 156 U. S., 185, 196.
Missouri vs. *Elliott*, 102 F. R., 96.
U. S. vs. *Younger*, 92 F. R., 672 and c. c.

Respectfully submitted,

ANTONIO KNAUTH,
Of Counsel for Defendant in Error.

AMERICAN LITHOGRAPHIC COMPANY *v.* WERCKMEISTER.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 115. Argued April 10, 1911.—Decided May 29, 1911.

The forfeiture for infringement of copyright prescribed by § 4965, Rev. Stat., is not only for every copy found in possession of the infringer, but in the alternative for every copy by him sold.

Where a distinction is plainly made in an act of Congress prescribing penalties as to different classes of the offense, the court need not search for the reason for making the distinction but must give it effect.

Under § 4965, Rev. Stat., no penalty for infringement can be recovered with respect to prints, photographs, etc., except for sheets found in defendant's possession, and there cannot be two actions as to the same copies, one for replevin and the other for penalty; but with respect to paintings, statues and statuary an action can be brought for penalties on copies sold by the infringer and not included in those replevied in another action. *Werckmeister* v. *American Tobacco Co.*, 207 U. S. 375; *Hills* v. *Hoover*, 220 U. S. 334, distinguished.

The authority to issue writs conferred on courts of the United States by § 14 of the Judiciary Act of 1789, and § 716, Rev. Stat., includes the authority to issue subpœnas *duces tecum;* and it was not the purpose of § 724, Rev. Stat., to interpose an obstacle with respect to the issuance of such subpœnas.

The act of July 2, 1864, c. 210, § 3, 13 Stat. 351, now Rev. Stat., § 858, removing disabilities of witnesses on account of being parties to the action removed whatever obstacle existed as to issuing subpœnas *duces tecum* to parties.

Section 860, Rev. Stat., providing that no pleading or discovery obtained from a party or witness by means of judicial proceeding shall be used against him in any criminal proceeding, relates to using the evidence in a subsequent proceeding.

A corporation defendant in a suit to enforce penalties under § 4965, Rev. Stat., for infringment of copyright is not entitled under the Fourth or Fifth Amendment to object to the admission of evidence of entries in its books produced under a subpœna *duces tecum*. *Wilson* v. *United States*, *ante*, p. 361.

THE facts, which involve the construction of § 4965, Rev. Stat., are stated in the opinion.

Mr. Wm. A. Jenner for plaintiff in error:

Section 4965 is a penal statute, and prosecutions under it, although civil in form, are essentially criminal prosecutions. See *Backus* v. *Gould*, 7 How. 798, 811, construing the sixth section of the act of February 3, 1831, corresponding to § 4965. *Bolles* v. *Outing Co.*, 175 U. S. 262, 264; *Werckmeister* v. *Am. Tobacco Co.*, 207 U. S. 375, 381.

Discovery, i. e., production of books and papers, will not be ordered in chancery in aid of an action to enforce penalties. See 2 Story's Eq. Jur., §§ 1319, 1494; 2 Daniel's Ch. Pl. & Pr. 1557; 2 Beach, Mod. Eq. Jur., § 871; 2 Story, Eq. Jur., § 1494; *Horsburg* v. *Baker*, 1 Pet. 232; *Boyd* v. *United States*, 116 U. S. 616, 631; *United States* v. *Saline Bank*, 1 Pet. 100; *Counselman* v. *Hitchcock*, 142 U. S. 563.

The exemption has always been allowed in actions for penalties under the copyright and patent laws. *Atwill* v. *Ferrett*, 2 Blatchf. 39; *Johnson* v. *Donaldson*, 18 Blatchf. 287; 1 Daniel's Chancery Pr., 4th Am. ed., 563; Story's Eq. Pl., § 575; *Snow* v. *Mast*, 63 Fed. Rep. 623; *Daly* v. *Brady*, 69 Fed. Rep. 285. Section 724 has been applied to exempt from production in penalty cases against corporations. *United States* v. *National Lead Co.*, 75 Fed. Rep. 94.

The compulsory production of defendant's books and the obtaining of evidence therefrom in support of plaintiff's case was error, and the rights of plaintiff in error under Rev. Stat., §§ 724 and 860 were violated by the compulsory production of its books and the compulsory reading in evidence by Mr. Eddy, its treasurer, of entries therefrom. The subpœna *duces tecum* was not rightfully available to the plaintiff to obtain production of books in a penalty action. Section 724 governs the production of books in an action at law. Under § 724 defendant could not rightfully be compelled to produce its books. As to

the authority to issue the subpœna *duces tecum*, Section 724 controls the production of book evidence from the adversary party at the trial and excludes all other modes of compelling production. *Ex parte Fisk*, 113 U. S. 713; *Union Pacific R. R. Co.* v. *Botsford*, 141 U. S. 250; *Hanks Dental Assn.* v. *Tooth Crown Co.*, 194 U. S. 303.

The history of § 724 shows that its object was to provide in actions at law a method of obtaining inspection of books and papers analogous to discovery in equity. *Owyhee Land Co.* v. *Tautphaus*, 109 Fed. Rep. 547; *Hylton's Lessee* v. *Brown*, 1 Wash. C. C. 298; *Finch* v. *Rikeman*, 2 Blatch. 302.

In Blackstone's time the subpœna *duces tecum* was not available in actions at law for bringing into court the books of a party, and hence was not a writ "agreeable to the usages and principles of law," under § 14 of the Judiciary Act of 1789 (Rev. Stat., § 716). In *Merchants' Nat. Bank* v. *State Nat. Bank*, 3 Cliff. 201, the court held that at common law parties could not be compelled to attend or by subpœna *duces tecum* to produce books. *United States* v. *Reyburn*, 6 Pet. 363; *President &c.* v. *Hillard*, 5 Cowen, 419.

In suits in equity resort has sometimes been had to subpœnas *duces tecum* to obtain from the adverse party production of books, as in *Bischoffsheim* v. *Brown*, 29 Fed. Rep. 341; *Johnson Steel Co.* v. *North Branch Co.*, 48 Fed. Rep. 191, 195; *Edison Elec. Co.* v. *U. S. Elec. Co.*, 44 Fed. Rep. 294; *Same* v. *Same*, 45 Fed. Rep. 55. But see *Gregory* v. *Chicago, M. & St. P. R. Co.*, 10 Fed. Rep. 529; *Kirkpatrick* v. *Pope Mfg. Co.*, 61 Fed. Rep. 46.

Section 724 has not been modified expressly or by implication.

Section 860 is expressly applicable to actions for the enforcement of a penalty and prescribes that "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceed-

ing . . . shall be given in evidence, or in any manner used against him" in such an action.

Mr. Antonio Knauth for defendant in error.

MR. JUSTICE HUGHES delivered the opinion of the court.

This is a writ of error to review a judgment of the Circuit Court of Appeals affirming a judgment upon a verdict in favor of Emil Werckmeister, plaintiff below. The action was brought under § 4965, p. 959, ch. 3, of the United States Revised Statutes, to recover penalties for the infringement of a copyright. The subject of the copyright was the painting "Chorus," and the penalties demanded were for copies printed and sold by the Lithographic Company.

It is contended that the recovery was unauthorized by the statute, for the reason that the copies were not found in the defendant's possession. Section 4965, Rev. Stat.; 3 U. S. Comp. Stat., p. 3414, so far as material, provides:

"SEC. 4965. If any person, after the recording of the title of any map, chart, dramatic or musical composition, print, cut, engraving, or photograph, or chromo, or of the description of any painting, drawing, statue, . . . shall . . . engrave, etch, work, copy, print, publish . . . or import, either in whole or in part, . . . or, knowing the same to be so printed, published, . . . or imported, shall sell or expose to sale any copy of such map or other article, as aforesaid, he shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale; and in case of a painting, statue, or statuary, he shall forfeit ten dollars for every copy of the same in his possession, or by him sold or exposed for sale."

The contention is "that the penalty attaches in the case of a *painting* only under the same conditions as in the case of a *print;* that the intent of the statute is to differentiate a *painting* from a *print* only in respect to the amount of the penalty, $1 in case of a print, and $10 in case of a painting; and that, in both cases, a *finding in possession of the defendant* is a condition precedent to the recovery of the penalty." It is further urged that only one action can be maintained for forfeiture of the copies and for the penalties, and that the action lies only against the person in whose possession the copies are found, and that the penalties are to be computed upon the number so found.

The argument fails to give effect to the express provision of the statute. Its words are "he shall forfeit ten dollars for every copy of the same in his possession, *or by him sold* or exposed for sale." No process of construction can override this explicit language. The prescribed forfeiture is not only for every copy found "in his possession," but, in the alternative, for every copy "by him sold." We need not search for the reason for the distinction between maps, charts, photographs, prints, etc., on the one hand, and paintings, statues and statuary on the other. The character of the latter suggests the basis; but the distinction is plainly made, and it must be given effect.

With respect to prints, photographs, etc., the money penalty for the acts defined is "one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale." The words "found in his possession" limit the entire clause. And no penalty can be recovered in such case except for sheets found in the possession of the defendant. *Bolles* v. *Outing Company*, 175 U. S. 262.

The cases of *American Tobacco Company* v. *Werckmeister*, 207 U. S. 284, and *Werckmeister* v. *American To-*

bacco Company, 207 U. S. 375, related to the same copyrighted painting that is involved here. In the first case there was a recovery in an action in the nature of replevin of 1196 sheets containing copies. The second action was brought to recover the money penalties for the sheets seized in the former action. The question was whether there could be two actions against the same party; one for the seizure of the sheets forfeited and another for the penalties, and it was held "that the statute contemplated but a single action in which the defendant should be brought into court, the plates and sheets seized and adjudicated to the owner of the copyright, and the penalty, provided for by the statute, recovered." See *Hills & Company* v. *Hoover*, 220 U. S. 334, 335. These decisions did not involve the determination that an action could not be brought to enforce the forfeiture prescribed by the statute in a case of the sale of copies of a copyrighted painting where there was no finding in possession, and hence no proceeding to forfeit copies so found. Here, there is no attempt to recover in a second action penalties which should have been embraced in a former action; and the recovery is based simply upon the forfeiture incurred by sales of the prohibited copies.

Assuming that the action for the penalties would lie, it is further contended by the defendant company that its rights under § 724, p. 137, c. 12, and § 860, p. 163, c. 17, of the Revised Statutes were violated by the compulsory production of its books and the reception in evidence of entries showing sales of infringing copies.

Without attempting to state in detail the proceedings which culminated in the introduction of the book entries in evidence, it is sufficient to say that after a review of the course of the trial, and of the directions and rulings of the court during its progress, we are satisfied that the enforced production of the books cannot properly be said to rest upon an order made under § 724, but that in fact they

were produced under a subpœna *duces tecum* served upon the company's officer.

But, it is urged, that the books were those of a party to the action, and hence that the limitations of § 724 must be deemed controlling; that in actions at law this section excludes all other modes of compelling production of books or writings by the adversary party.

Under § 14 of the Judiciary Act of 1789 (§ 716, Rev. Stat.), power was conferred upon the Federal courts to issue all writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the practice and usages of law. This comprehended the authority to issue subpœnas *duces tecum*, for "the right to resort to means competent to compel the production of written, as well as oral, testimony, seems essential to the very existence and constitution of a court of common law." *Amey* v. *Long*, 9 East, 484. Section 724, which was originally § 15 of the Judiciary Act of 1789, was to meet the difficulty arising out of the rules relating to parties at common law and to provide, by motion, a substitute *quoad hoc* for a bill of discovery in aid of a legal action. *Carpenter* v. *Winn*, decided this day, *ante*, p. 533.

But by the act of July 2, 1864, c. 210, § 3, 13 Stat. 351, it was provided that there should be "no exclusion of any witness on account of color, nor in civil actions because he is a party to, or interested in, the issue tried." This provision was continued in § 858 of the Revised Statutes. "The purpose of the act in making the parties competent was, except as to those named in the proviso, to put them upon a footing of equality with other witnesses, all to be admissible to testify for themselves and compellable to testify for the others." *Texas* v. *Chiles*, 21 Wall. 488, p. 492. Section 858 was amended by the act of June 29, 1906, ch. 3608 (34 Stat. 618), which refers the competency of witnesses in the courts of the

United States to the laws of the State or Territory in which the court is held.

It was not the purpose of § 724 to interpose an obstacle to the exercise of the general power of the court with respect to the issuance of subpœnas *duces tecum*, and that was not its effect. The barrier, in the case of parties, existed independently of the provisions of the section and by these it was sought to mitigate the resulting inconvenience. When, however, the rule as to parties was changed it followed that the obstacle was removed and by virtue of the general authority of the court subpœnas *duces tecum* may run to parties as well as to others,—leaving those who are subpœnæd to attack the process if of improper scope or lacking in definiteness, or to assert against its compulsion whatever privileges they may enjoy. See *Merchants' National Bank* v. *State National Bank*, 3 Cliff. 203, 204; *Nelson* v. *United States*, 201 U. S. 92.

We conclude, therefore, that no question arises under § 724, which cannot be regarded as providing an exclusive procedure. The subpœna was valid; and the books called for were produced. The inquiry, then, is as to the admissibility of the entries.

It is insisted that the evidence was inadmissible under § 860 of the Revised Statutes. This ground, although it had been relied upon earlier in the trial, was not included in the objection—as it was formally stated at length—when the books were finally produced and the entries offered. But, apart from this, the statute did not afford a sufficient basis for objection.

Section 860—since repealed by the act of May 7, 1910, ch. 216 (36 Stat. 352),—was a reënactment of § 1 of the act of February 25, 1868, ch. 13 (15 Stat. 37), and provided:

"SEC. 860. No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall

be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: *Provided*, That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."

This language is inapposite here, for it manifestly refers to a case where, in some prior judicial proceeding, discovery had been made or testimony had been given and the evidence so obtained was sought to be used. The object of the statute is sufficiently plain. It was intended to give immunity as to subsequent proceedings to the one making discovery or testifying. But it was held to be inadequate, because it was not co-extensive with the constitutional privilege. *Counselman* v. *Hitchcock*, 142 U. S. 547, 564; *Brown* v. *Walker*, 161 U. S. 594.

In the present case, the question, therefore, must be whether under the Fourth and Fifth Amendments of the Constitution of the United States the defendant Company, as it contends, was entitled to object to the admission in evidence of the entries from its books. As to this, we need only refer to the recent decisions of this court. *Hale* v. *Henkel*, 201 U. S. 43; *Nelson* v. *United States*, *supra*; *Hammond Packing Company* v. *Arkansas*, 212 U. S. 348, 349; *Wilson* v. *United States*, decided May 15, 1911, *ante*, p. 361.

We have examined the errors assigned with respect to other rulings on questions of evidence and the refusal of the court to direct a verdict for the defendant, and we find no ground for a reversal of the judgment.

Affirmed.